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REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION,

APRIL TERM, 1882.

AND FOR THE

EASTERN DIVISION,

SEPTEMBER TERM, 1882.

BENJAMIN J. LEA,

ATTORNEY-GENERAL AND REPORTER.

VOLUME IX.

NASHVILLE:

ALBERT B. TAVEL, LAW BOOK PUBLISHER.

1882.

Entered according to Act of Congress, in the year 1882, by
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION.

JACKSON,....., APRIL TERM, 1882.

J. A. ANDERSON, Adm'r. v. J. J. AMMONETT *et al.*

1. **LEASE.** *Lien for improvements passes to assignee.* A stipulation in a lease for the valuation, at the end of the term, of any improvements made by the lessee, and for a lien on the improvements for the amount of the valuation, if not paid by the lessor, shall pass to an assignee of the lease.
2. **CHANCERY PLEADINGS AND PRACTICE.** *Infant. Bona fide purchaser.* A decree of a court of chancery confirming a lease of an infant's realty is so far binding on the infant, that he cannot, by a bill of review, an original bill or other proceeding, impeach it to the prejudice of a *bona fide* purchaser for value, of the leasehold interest, before suit brought
3. **SAME.** *Equities. Prior and junior. Assignee.* The rule in this State, except when changed by statute, or in deference to statutory policy is, that a prior equity will prevail over a junior equity and the legal title with notice, or over the legal title of a volunteer with or without notice, and a purchaser in satisfaction of a pre-existing debt, and an assignee in trust to secure such a debt have always been treated, under the rule, as volunteers.

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4. LEASE. *Assignment. Infant. Equities.* The equity, therefore, of an infant growing out of the fraud of the lessee in procuring a lease and a decree of court sanctioning the lease, is superior to the rights of a beneficiary under an assignment of the lease and leasehold interests to secure a pre-existing debt.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

CALVIN VANCE and R. J. MORGAN for compli-
ants.

HUMES & POSTON, JARNAGIN & FRAYSER and BIG-
ELOW & HILL for defendants.

COOPER, J., delivered the opinion of the court.

On the 1st of January, 1857, Martha P. Talbot, the guardian of her infant children, Mary H. and Delia W. Talbot, undertook to lease to J. M. Province and E. P. Stewart, certain lots in the city of Memphis, owned by her children in severalty. Two separate instruments were drawn up and executed by the parties, one covering the lots of Mary, and the other the lots of Delia. They were substantially alike, except that the term of the lease of the land of the first named daughter was eleven years, and the term of the other lease thirteen years. The lessees agreed, on their part, to pay a ground rent mentioned, annually, and all taxes and public charges levied during the term. There was no stipulation on their part to

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make improvements, but each lease contained the following provisions: "At the expiration of the aforesaid term, the buildings and improvements on each lot of ground are to be valued by two competent and disinterested men, and the valuation thereof at the time is to be allowed to the said Provine and Stewart, or their assigns, and, upon the payment of the said valuation, the said Provine and Stewart, or their assigns, are to deliver up possession of said lots and improvements. In the event that the said valuation is not paid to Provine and Stewart, or their assigns, a lien is hereby retained on said improvements for said valuation." Afterwards Provine and Stewart filed a bill in the chancery court against the guardian and wards to obtain the approval of the court to these leases. Such proceedings were had in the cause that on the 19th of January, 1859, a decree was rendered, "that the said leases be sanctioned, ratified and confirmed, and become valid and binding, as well upon the said minors and their estates as upon the complainants."

On September 1, 1859, Provine and Stewart, by deed of trust of that date, conveyed to Sylvester Bailey "the said several messuages or tenements and premises," so leased to them, "with all improvements and appurtenances, and also, all the estate, rights, titles, interest, terms of years yet to come and unexpired, property, claim and demand whatever of them the said J. M. Provine and E. P. Stewart, or either of them, of, in and to the same, or of, in and to any part or parcel of all and every of the aforesaid premises, together with the said several leases themselves." This

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conveyance was made to secure a large debt of about \$56,000 due to the estate of Geo. P. Cooper, deceased, for money borrowed either to improve the leasehold property, or to pay for improvements already made. And the trustee was authorized, at the maturity of the notes given to secure the debt, to sell "the premises for cash in satisfaction thereof." On the 17th of June, 1865, the trust deed was foreclosed by a sale for the unpaid debt, and the "several leases, lots and premises, and terms thereon, together with the tenements, improvements, privileges and appurtenances thereto belonging, and all the estate, interest, claim and rights thereto as fully as the same were vested in the trustee by the trust deed," were sold and conveyed to J. M. Provine at the price of \$43,907.80, "being the balance then due from Provine and Stewart." By agreement with the representative of Cooper's estate, Provine gave his four notes of \$10,976.90 each, at one, two, three and four years, with interest, for the purchase price, and secured the same by a conveyance of that date to W. B. Waldren, as trustee of "all the right, title, estate and interest had, held, owned and enjoyed by J. M. Provine and E. P. Stewart," in the leased lots, and "also all the rights, interests, powers and privileges had, held, owned and claimed by said Provine and Stewart in regard to said lots and the improvements thereon, under and by virtue of the leases and decree of the chancery court confirming the same." The trustee was authorized, among other things, to sell for cash, free from any equity of redemption, upon default of payment.

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On January 11, 1868, Mary H. Talbot, who had come of age, filed her bill against J. M. Provine, for the purpose of reviewing, setting aside and vacating the decree confirming the lease made by her guardian, and asking that the lease be declared void, and she be restored to the possession of her property. Delia W. Talbot subsequently filed a similar bill. Such proceedings were had in these cases, heard together, that finally, by a decree of this court, at its April term, 1874, the contracts of leases, and the decrees confirming them, were set aside, because of the failure of Provine to disclose to the court the fact that he had been employed by the guardian to lease the lots, the concealment operating as fraud upon the minors. But the court declined to hold the lessees to an account for rents and profits, unless they should elect to claim for improvements, in which event the account might be taken. Provine having died, his administrator declined to go into an account, and waived all claim for improvements, whereupon a final decree was rendered in favor of the complainants, and they were confirmed in the possession of the property.

The chancellor had reached a different conclusion in these cases, and had found that the complainant, Mary H., was indebted to Provine in the sum of \$13,365 for improvements, and that Delia W. indebted to him in the sum of \$10,921. Pending the appeal from these decrees in this court, on the 13th of June, 1873, the original bill in the cause now before us was filed. The bill was filed by J. A. Anderson, as administrator *de bonis non*, with the will annexed, of

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Geo. P. Cooper, deceased, against J. J. Ammonett, administrator of J. M. Provine, deceased, John P. Hillman and Mary H., his wife, formerly Mary H. Talbot, Robert C. Williamson and Delia W., his wife, formerly Delia W. Talbot, W. B. Waldren, and James T. Pettit, the latter as the successor of Waldren as trustee, under the last trust assignment of the leasehold property by Provine, and others. The bill set out the indebtedness of Provine to the estate of Geo. P. Cooper by the execution of the notes of the 17th of June, 1865, and the conveyance of the leasehold property by him on the same day to W. B. Waldren, in trust, to secure the notes; and stated that two of the notes had been paid, leaving the other two unpaid; that Waldren had refused to execute the trust, and proceedings had been instituted to remove him, which had, after long litigation, been successful, and that defendant Pettit had been appointed in his place, who, however, was unwilling to give the security required to enable him to execute the trust. The bill then further set out the institution by Provine of the suit against Mary H. and Delia W., and the recovery therein had in the chancery court as above mentioned, and that the suit was then pending in the Supreme Court, and asked that the recovery should be applied to the payment of the notes due to the Cooper estate. On the 6th of October, 1874, an amended bill was filed. The decree of the chancellor in the suits of Mary H. and Delia W. against Provine, having been then reversed in this court, the object of the amended bill was to have a valuation made

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of the improvements on the leased lots at the coming of age of the minors, and the appropriation of that valuation to the satisfaction of Provine's notes.

Hillsman and wife, and Williamson and wife demurred to the bill as amended, upon the ground, among others, that Stewart was a necessary party, the bills not showing any alienation of his interests, and that the bills failed to show the terms of original lease. The demurrers were overruled, with leave to the defendants to rely upon the two matters of demurrer mentioned, unless the bills were amended. Thereupon, a second amended bill was filed. The bill set out the original lease made by the guardian to Provine and Stewart, and the proceedings in the chancery court confirmatory thereof. It further stated, the loan of the money by the Cooper estate to Provine and Stewart, the execution by them of the trust deed to Bailey, the foreclosure of the trust, and the purchase by Provine at the sale, whereby he became the sole owner of the leasehold interests. Stewart was not made a party defendant.

To the complainant's bill as thus amended, the defendants, Hillsman and wife and Williamson and wife filed a plea setting forth the proceedings and final decree in the suit of themselves against Provine as an adjudication of the matters of controversy in their favor. They also pleaded that the cause of action occurred more than six years before the filing of the bill. The chancellor was of opinion that the defenses should be made by answer, and overruled the pleas. The defendants then answered, filing their answer as

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a cross-bill repeating the matters of the pleas, and asking that the complainant, in the event he recovered the value of the improvements, be held liable for the rent received by Provine. The chancellor, on final hearing, dismissed the bill, and the complainant appealed.

Mary H. Talbot, now Hillsman, came of age on the 13th of January, 1867, and Delia W. Talbot, now Williamson, came of age on the 30th of March, 1869. In the decision of their suits against Provine, brought after they had respectively arrived of age, this court was of opinion that the decree confirming the leases contained all the recitals necessary to give the court jurisdiction, and that there was no error in the proceedings which could be reached by a bill of review. The court was further of opinion that the bill might be treated as an original bill to set aside the decree for fraud in its procurement, and that there was sufficient fraud for this purpose in the conduct of Provine, in concealing from the court the fiduciary relation in which he stood to the parties: *Talbot v. Provine*, 7 Baxt., 502. The complainants were, therefore, restored to the possession of the property, the defendant, Provine, waiving any account for improvements. The present defendants can, consequently, claim that the adjudication of the court in that case was, and is conclusive as between them and Provine. For, whatever rights may have been acquired under the trust assignment of Provine and Stewart, the original equity again attached to the leasehold estate when revested in Provine by the foreclosure sale: *Armstrong v. Camp-*

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bell, 3 Yer., 201; *Kennedy v. Daly*, 1 Scho. & Lef., 379. Unless the complainant occupies a higher vantage ground, the adjudication must be equally conclusive on him.

The original leases were loosely worded. It was noticed in the former opinion of this court that they contained no obligation on the part of the lessees to make any improvements on the leased premises. It is equally noticeable that they contain no obligation on the part of either the guardian or ward to pay for the improvements which might be made. Each lease merely provides for the valuation of any improvements at the expiration of the term, and for a surrender of the premises upon the payment thereof, retaining a lien on the improvements for the amount of the valuation if not paid. The guardian could not have bound the ward for the payment of the improvements: *Barrett v. Cocke*, 12 Heis., 566; Code, sec. 2515. And the court, by its decree confirming the leases, has not done so. It is entirely optionary with the reversioners to pay the valuation. There is clearly no lien in favor of the lessees on the land. The only lien is on the improvements. The stipulations of these leases may be considered as analogous to the usual stipulation in favor of the lessee of the right to remove the improvements: *Allen v. Dent*, 4 Lea, 676; *Cheatham v. Plinke*, 1 Tenn. Ch., 576; *Hite v. Park*, 2 Tenn. Ch., 373. Such stipulations would, probably run with the land: *Van Rensselaer v. Penniman*, 6 Wend., 569; *Holmam v. Abrams*, 2 Duer, 435.

It is expressly agreed by the parties that the per-

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sonal representative of Geo. P. Cooper's estate, loaned to Provine and Stewart a large amount of money for the purpose of enabling them to erect the building on the leased lots, and that the money was so used. It was further agreed that at the time of the loaning, and at the time of taking from Provine and Stewart the trust assignment of September 1, 1859, and from Provine the trust assignment of June 17, 1865, the personal representative of Cooper had no knowledge or information that Provine was, or had been the agent of the guardian to rent the lots, or of any of the circumstances tending to establish the fraud on his part for which the leases and the decrees confirming them, were set aside. It is not agreed, nor does it anywhere appear by proof, that the money was loaned in consideration of the execution of the trust assignment, or contemporaneously therewith. On the contrary, it clearly appears that the improvements were completed in the summer and fall of 1857. The fair inference is, that the trust assignment was made to secure a debt already in existence, upon the execution of notes of even date having from one to five years to run. This trust deed was foreclosed, June 17, 1865, by a sale, at which Provine became the purchaser at the price of \$43,907.80, "being," says the agreed statement of facts, "the balance then due from Provine and Stewart," to the personal representative of Cooper's estate. The property was duly conveyed to him by the trustee, he, by agreement with the personal representative, giving his four notes on time for the purchase money, and executing the assignment to Wal-

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dren to secure their payment. The present bill is filed to obtain the benefit of the assignment to the extent of the lien secured by the leases for the payment of the valuation of the improvements. And the complainant claims that he is entitled to this relief, notwithstanding the decree setting aside the leases for fraud, because he was a *bona fide* purchaser of the leasehold property for value and without notice, before the commencement of the suit in which that decree was rendered.

The weight of authority undoubted is, that a decree for the sale of an infant's land, in a case in which he is a party, and over which the court has jurisdiction, is so far binding on the infant that he cannot, either by a bill of review, or by an original bill, or other proceeding, impeach it to the prejudice of the rights and interests of a *bona fide* purchaser for value, and without notice of the error: *Winchester v. Winchester*, 1 Head, 500; *Livingston v. Noe*, 1 Lea, 66; *Bennett v. Hamill*, 2 Scho. & Lef., 575; *Wright v. Miller*, 1 Sandf. Ch., 103. The same rule would apply to a decree sanctioning a lease of the infant's land, the lease being *pro tanto* a sale. Our act of 1835, ch. 20, sec. 16, brought into the Code, sec. 3186, which provides that the title of a purchaser under a judgment or decree, executed before writ of error obtained and *supersedeas* granted, shall not be disturbed by the subsequent reversal, is in affirmance of the common law: *Lewis v. Baker*, 1 Head, 385; *Freem. on Judg.*, sec. 484. The reason is, that innocent third persons cannot be expected to look out-

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side of the proceedings of courts of general jurisdiction, and have a right to assume that their judgments and decrees, in all cases in which they have jurisdiction of the parties and the subject-matter, are regular and valid. Fraud in the procurement of private contracts, while it authorizes the injured party to avoid the contract, leaves the contract in force until such party elects to avoid it, and will not affect the title of an immediate innocent purchaser from the fraudulent vendee: *Arendale v. Morgan*, 5 Sneed, 703; *Hawkins v. Davis*, 5 Baxt., 698; S. C., 8 Baxt., 506. And, *a fortiori*, must the rule apply to contracts or results worked through the instrumentality of courts of justice in the passing of title to property.

The conclusion reached in *Talbot v. Provine* was, that the court of chancery, by virtue of its general jurisdiction over the person and estate of infants, could direct the sale of their realty, and consequently, sanction a lease thereof for a definite period; that the court, under the proceedings instituted to confirm the leases, had jurisdiction of the person of the infants and of the subject-matter; and that the decree of confirmation was valid on its face. The fraud, for which the contract was set aside as between the parties, was made out by proof outside of the record. If, therefore, the complainant is a *bona fide* purchaser for value and without notice, within the meaning of the rule, he would not be affected by the avoidance of the contracts of lease by proceedings instituted after his rights were acquired. And it may be conceded that he is a purchaser, having the legal title of the lease-

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hold property in dispute through the trustee in the assignment, and without notice of the equity of the defendants. Is he also a purchaser for a valuable consideration within the rule?

The protection conceded to a *bona fide* purchaser for value is carefully guarded, for the obvious reason that it operates to the injury of the rightful owner, who may be equally innocent and equally meritorious. It is surrounded by restrictions, sometimes of a technical or arbitrary character, so as to prevent it from becoming a cloak to fraud. The rule in this State, except when changed by statute, or in deference to statutory policy, has always been that of the English court of chancery, that a prior equity would prevail over a junior equity and the legal title with notice, or over the legal title of a volunteer, with or without notice. And a purchaser, in satisfaction of a pre-existing debt, and, for a stronger reason, an assignee in trust to secure such a debt, have always been treated as volunteers. Accordingly, where a party entitled to redeem land was prevented from redeeming by the fraud of the purchaser, and the purchaser sold and conveyed the land to a third person in payment of a pre-existing debt, the equity of redemption was allowed to prevail over the title of the purchaser: *Guinn v. Locke*, 1 Head, 111. So, the equity of a vendee of land by parol to be paid, upon rescission, the purchase money, or the value of improvements, was held superior to the title of a purchaser of the land in satisfaction of a pre-existing debt: *Rhea v. Allison*, 3 Head, 177. And the rule, that the conveyance of

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land in payment of a pre-existing debt does not entitle the grantee to protection as an innocent purchaser, has been re-enunciated in the recent case of *Jarman v. Farley*, 7 Lea, 141. It follows, necessarily, that an assignee under an assignment to secure pre-existing debts cannot occupy any higher ground than an actual purchaser in satisfaction of such a debt. In the case therefore, of a constructive trust arising from the use by a guardian of the funds of his ward in the purchase of property, the ward's equity was held to prevail over the title of such an assignee: *Turner v. Pettigrew*, 6 Hum., 438. So, of the equity of a claimant under an unregistered contract for a mortgage on the specific property: *Cook v. Cook*, 3 Head, 719. So, of the vendor's equity for the unpaid purchase money of land: *Brown v. Vanleer*, 7 Hum., 239. Of these last two cases, the correctness of the first has been doubted, and the second has been overruled in deference to the supposed policy of our registration laws: *Simpkinson v. McGee*, 4 Lea, 437; *Jones v. Ragland*, 4 Lea, 542. But these laws cannot possibly apply to an equity neither within their terms nor their policy. Such is a constructive trust or equity arising from fraud: *Perry on Trusts*, sec. 217. Of course, where instruments have actually been executed which are required to be registered, and the rights of the parties turn upon the priority of registration, the registry laws necessarily apply: *Knowles v. Masterten*, 3 Hum., 619; *Myers v. Ross*, 3 Head, 60; *Kirkpatrick v. Ward*, 5 Lea, 432; *Simpkinson v. McGee*, 4 Lea, 437.

The equity of the defendants in this case to be re-

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stored to their lands because of the fraud of Provine is, therefore, an equity not within the purview or policy of the registration laws. It is a meritorious and substantial equity, which will prevail over the equity of a subsequent purchaser in satisfaction of a pre existing debt, and, *a fortiori*, of a trustee or beneficiary under an assignment to secure such a debt. Both parties are equally innocent and equally meritorious, and their rights, as between them, must be determined by the settled law applicable to such cases. The leased property was surrendered by Provine to Hillsman and wife on September 25, 1868, and to Williamson and wife on the 1st of April, 1870, under decrees of the chancery court, and writs of possession. Neither the personal representative of Cooper nor the trustees under the assignments had ever been in possession of the premises. Both of the assignments were made to secure pre-existing debts, and without, so far as appears, any consideration passing at the time. The only consideration which could be inferred from the facts and circumstances would be the consideration of the extension of time for which the notes secured in each instance had to run. The old notes and old assignment were not given, as argued by the learned counsel of the complainant, for the new notes and new assignment. They were simply extinguished by the foreclosure sale, as they would have been by a sale under a court decree, and the conveyance of the trustee to Provine recites that, by agreement of the parties, Provine executed his notes for the purchase money, instead of paying the cash. It does not ap-

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pear that the time was given upon any consideration other than the mutual interest of the parties. A valuable consideration includes not only some valuable thing or property paid or transferred, but also some loss of property or right, or the forbearing of some legal right or remedy: Perry on Trusts, sec. 220. The mere giving of time, however, in a pre-existing debt of itself can no more, in the case of a trust assignment to secure it, be treated as a valuable consideration, than the time which is necessarily given when such a debt is satisfied by the conveyance of property. If the extension of time alone can ever be treated as a valuable consideration within the rule of a *bona fide* purchaser, it must be when it is expressly bargained for. No such case is made by this record.

Affirm the decree with costs.

 M. H. RIELLY v. C. B. ENGLISH.

1. WITNESSES. *Administrators, Transaction with or statement of deceased.*
The statute which forbids either party, in an action by or against a personal representative, to testify against the other as to any transaction with, or statement by the deceased, cannot be extended by the courts to cases not within its terms, upon the ground that they fall within the evil which was intended to be guarded against.
2. SAME. *Same. Same.* Where, therefore, in an action of replevin, the defendant claimed title as the administrator of a deceased intestate,

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the vendor of the plaintiff is a competent witness to prove the agreement between him and the deceased in relation to the chattel, although the title of the deceased was also claimed to be derived by purchase from the witness.

3. *SAME. Same. Same. Book of accounts.* In such an action, the book of accounts of the deceased, purporting to contain an account in his hand-writing, with the witness, is not admissible as evidence on behalf of the defendant to prove the state of accounts between deceased and the witness, with a view to establish the title of the deceased to chattel sued for.

 FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

L. & E. LEHMAN for Rielly.

SNEED & GREENE for English.

COOPER, J., delivered the opinion of the court.

Action of replevin for a safe, commenced before a justice. Upon the trial in the circuit court, the verdict and judgment were in favor of the defendant, and plaintiff appealed.

Brewer and Stewart had been partners as merchants for about six months, in 1872. After the dissolution of their partnership, Stewart went into business separately, and conducted a store until his death in 1878. The safe in controversy seems to have been originally bought by Brewer before his connection with Stewart. After they separated, in 1873 or 1874, it was sent by Brewer to the store of Stewart, where it remained until his, Stewart's death, in 1878. The plaintiff

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claimed under Brewer by sale made in December, 1878, after Stewart's death. The sale, according to the testimony of both Brewer and plaintiff, was for one hundred and fifty dollars, of which eighteen dollars were to be paid in a debt due from Brewer to plaintiff, and the residue when plaintiff got possession of the safe. The defendant, who was the administrator of Stewart, claimed that the safe belonged to Stewart, and came to his hands as an asset of his intestate's estate.

The proof of the plaintiff tended to show that the safe belonged to Brewer, and was sold by him to the plaintiff. The proof of the defendant tended to show that Brewer had sold the safe to Stewart, and that he had paid for it. As rebutting evidence, the plaintiff introduced Brewer as a witness, and asked him to state the circumstances under which the safe was removed to Stewart's store, and what the agreement between him and Stewart was in regard to it. The defendant objected to the question, and the court sustained the objection, to which the plaintiff excepted.

The question, it is obvious, went to the very heart of the controversy, and the materiality of the testimony is obvious whatever might be the purport of the answer: *Hogan v. State*, 5 Baxt., 615. His Honor's ruling seems to have been based upon the idea that the real parties to the suit were Brewer and the personal representative of Stewart, and that the testimony was inadmissible under the Code, sec. 3813d. That section is: "In actions or proceedings by or against executors, administrators or guardians,

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in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party." But this suit is not against the defendant as administrator of Stewart. It is true, the original summons, affidavit and bond did designate the defendant in his representative capacity, but these words of description, for in the form of action adopted they could only be treated as *descriptio personæ*, were stricken out before the trial by the justice. The suit was, from the first, in legal contemplation, and, after striking out the descriptive words, in form an action against the defendant individually. He might rely in defense upon the title of his intestate, but that would not prevent the plaintiff from proving the contract between Brewer and Stewart in relation to the safe. Nor, it seems, would it have prevented Brewer, if he had been the plaintiff, from testifying to the contract made with the deceased: *Johnson v. Hall*, 9 Baxt., 351. The statute cannot be extended by the courts to cases not within its terms, upon the idea that they fall within the evil which was intended to be guarded against: *Hughlett v. Conner*, 12 Heis., 86; *Fuqua v. Dinwiddie*, 6 Lea, 645.

The defendant, when examined as a witness in his own behalf, produced a book of accounts, which he said he had found among Stewart's books, and proved, over plaintiff's objection, that it contained an account of Brewer in the hand writing of Stewart. And the

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court permitted the witness, over the objection of the plaintiff, to introduce the account as evidence. The bill of exceptions only shows that the plaintiff excepted to the question put to the witness, without stating any ground for the objection. It is doubtful whether an objection in that form is sufficient to put the trial court in error: *Garner v. State*, 5 Lea, 218; *Fountain v. Pettee*, 38 N. Y., 184, *Ward v. Kilpatrick*, 83 N. Y. But the testimony offered, if properly objected to, was clearly inadmissible upon general principles: *Callaway v. McMillan*, 11 Heis., 588; *Black v. Fizer*, 10 Heis., 48; 1 Gr. Ev., sec. 115, *et seq.* It might be admissible to contradict or rectify the testimony of the witnesses of the plaintiff as to the state of accounts between the parties, if identified as the account spoken of by these witnesses, for which purpose it ought, perhaps, to have been first submitted to the witness, at any rate if merely intended to contradict him.

The testimony touching the statements of Brewer's wife in regard to the property in dispute, which were objected to, were admissible if she was shown to have been the general agent of the husband, and the fact of agency was fairly left to the jury upon a proper charge.

Reverse and remand.

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JAMES PETTIT v. JOSEPHINE COOPER *et al.*

1. SUPREME COURT. *Decree. Parties not of record.* Persons not parties to a suit at the rendition of a decree in this court, cannot be heard to make a motion to annul a part of that decree.
2. SUPREME COURT. *Jurisdiction. Decree void. When.* The jurisdiction of the court, so far as it is appellate, is confined to the subject-matter of the record and the parties before the court, and any action of the court, although entered in the form of a decree, which goes outside of the record, or undertakes to bind parties not before it, would be *coram non judice*, and void.
3. SAME. *Decree and written opinion.* A motion to annul a part of a decree as inadvertently entered, cannot be entertained, where the written opinion of the court expressly directs that the part of the decree objected to should be embodied therein.
4. SAME. *Power to reverse, alter or explain a decree.* The Supreme Court cannot adjudge rights acquired under one of its decrees, nor reverse, alter or explain a decree, entered in conformity with its opinion, upon motion.

MOTION.

Motion to partially annul a decree rendered at a former term. In this case, treated as a bill retained in court for the purpose of administering the estate of Geo. P. Cooper, deceased, an order of reference was made by the chancellor to ascertain and report the amount due Orlando Brown for services as agent of the executrix in managing the estate of the deceased under the will. The widow and children of the deceased, who were also the devisees and legatees under his will, were parties to the suit, as well as the personal representative appointed upon the resignation of

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the widow. The master reported the amount due to Brown, and this report was confirmed. The decree concludes thus: "It further appears and is decreed that said balance due said Brown is a proper debt and charge against the estate; and a decree is given said Brown for the said sum of \$3402.50, with interest from March 27, 1877, against J. A. Anderson, the administrator *de bonis non* of Geo. P. Cooper, deceased, to be paid out of the assets of said estate when they shall come into his hands, for which execution may issue as at law." From this decree, Anderson, as administrator, took an appeal to this court.

The cause was transferred to the docket of the Commission Court, and tried in 1879. That court held, in a written opinion, that the suit was virtually a suit for the administration of the estate of Geo. P. Cooper, that the court had jurisdiction to adjudge the claim of Brown, and that the claim was a proper charge on the estate of the deceased. The court further held that the decree below should be modified by charging Brown with the value of certain Confederate money received by him as the property of the estate, and that he should be limited to a recovery against the personal assets then in, or thereafter to come into the hands of administrator Anderson, and against any realty that may remain not partitioned, or specifically set apart to either of the devisees under the will of Cooper, no interest to be allowed either for or against him. A decree was drawn up, in accordance with this opinion, embodying the modification and limitation, the latter in the language of the opin-

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ion, and a reference was made to the clerk to ascertain the value of the Confederate money. His report was confirmed by a decree which concludes thus: "It is therefore ordered. adjudged and decreed that the said Orlando Brown, have and recover of the appellant, J. A. Anderson, administrator *de bonis non cum testamento annexo* of the estate of Geo. P. Cooper, deceased, the said sum of \$1801.16, for which execution may issue. to be levied, however, of the goods and chattels, rights and credits of the said Geo. P. Cooper, deceased, in the hands, or which hereafter may come to the hands of the said Anderson to be administered; and the said Brown is hereby restricted, for the satisfaction of the decree, to such assets, or to such real estate of the said Geo. P. Cooper, as has not been partitioned, or specifically set apart to any of the devisees under the will of the said Geo. P. Cooper, deceased."

The heirs and devisees of Cooper now, April 14, 1882, move the court to set aside and vacate the last clause of the above decree, upon two grounds:

1. That so much of that decree, as well as the corresponding part of the previous decree, was inadvertently rendered.

2. That the court had no jurisdiction to render any decree respecting the realty of said estate, the heirs and devisers not being before the court either as appellants or appellees.

If it be true that the heirs and devisees of Geo. P. Cooper were not before the court at the rendition of these decrees. it is very clear that they are not now

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before the court, and cannot be heard to make any motion in the cause. The jurisdiction of this court is appellate only, and confined to the subject-matters of the record brought up from the inferior court, and the parties before the court by the appellate proceedings. Any action of the court, although entered on the minutes in the form of a decree, which goes outside of the record, or undertakes to bind parties not before it, would be simply void: *Easley v. Tarkington*, 5. Baxt., 592.

If, however, the heirs and devisees were before the court, by reason of the fact that the claim of Brown was declared by the chancellor "to be a proper debt and charge against the estate," and that the appeal was by the general representative of the estate, and could now be heard to make this motion, it is impossible, upon the record, to say that the part of the decree in question was inadvertently rendered. It is in strict compliance not only with the conclusion announced in the opinion of the Commission Court, but was specially directed by that opinion to be embodied in the decree. It may be erroneous, or even void, but it cannot be said to be inadvertent: *State v. Disney*, 5 Sneed, 598; *Russell v. Colyar*, 4 Heis., 154.

It is suggested in the argument accompanying the motion, that Brown has obtained from the clerk of this court an execution on that part of the decree, and sold under it the remainder interest of the heirs and devisees in land allotted to the testator's widow in dower, she having dissented from the will. And

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the object of the motion is, perhaps, to obtain an expression of opinion by this court as to the propriety or legality of that proceeding. But we cannot act upon matter outside of the record nor adjudge rights acquired under a decree upon motion. And Lord Bacon's ordinance is that "no decree shall be reversed, altered or explained," but upon bill of review.

Motion disallowed.

SAMUEL HENDERSON v. W. H. S. HILL *et al.*

1. TRUSTEES. *Interest which they take.* The doctrine in this State is, that trustees take that quantity of interest which the purposes of the trust requires.
2. SAME. *Limitation of trust estate in fee.* An express limitation of the trust estate in fee, created by deed in land, will not be cut down to a less estate where the fee is required for the purposes of the trust, nor, it seems, in any case, unless the limitation be restrained by the terms of the deed to so much of the trust as relates to the equitable estate under a fee.
3. SAME. *Special or active trust.* A trust in fee in land, created to protect the estate for a prescribed period, and to preserve contingent remainders, is a special or active trust which is not executed in the beneficiaries either under the statute of uses, or the law as settled in this State.
4. SAME. *Trust. Legal and equitable estates. Execution operates. When.* An execution only operates upon an estate in which the legal title is coupled with the beneficial interest, or in which the legal and equitable interests are merged by law in the same person, or so combine in him that he has a right to call for an immediate conveyance of the

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legal estate: but there can be no merger nor right to call for the legal estate, where the legal and equitable estates are not commensurate, or where their union would be contrary to the intent of the grantor.

5. *SAME. Same. Execution will not operate. When.* An execution, therefore, will not operate on land conveyed in fee by deed to a mother in trust for her own use during life or widowhood, and, upon her death or marriage, to be conveyed by the trustee to such of her three daughters named as may then be living, and the children of such of them as may be dead, or, if the daughters be all dead, to their descendants *per stripes*, and, if no living descendants, to the grantors, the ultimate contingent remainder being conveyed by the grantor to the mother.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. McDOWELL, Ca.

SMITH & COLLIER for complainant.

J. G. & H. P. WALLACE for defendants.

COOPER, J., delivered the opinion of the court.

By this ejectment bill the complainant, Henderson, seeks to recover from the defendant, Hill, a tract of land near the city of Memphis, containing about twenty acres. Both parties claim under the same title; the complainant, as a purchaser of the land at execution sale, and the defendant, by conveyance from the execution debtor. The chancellor, on final hearing, dismissed the bill, and complainant appealed.

On the 3d of October, 1853, the land in controversy was conveyed to Elizabeth M. Currin, her heirs and assigns forever, by deed, to have and to hold, to her, her heirs and assigns forever, upon the following

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trusts, that is to say, "for and during the present widowhood of the said Elizabeth M. Currin, or for and during her natural life if she shall not again marry, in trust for the only proper use and benefit of herself, the said Elizabeth M. Currin; and upon the further trust that, at the marriage of the said Elizabeth M. Currin, if she shall again marry, or at her death, if she shall not again marry, that the said land be conveyed in fee to (her daughters), Sarah P. Currin, Eveline M. Currin and Catherine Currin, or such of them as shall be living then, and the child or children of any one or more of them, the child or children of a deceased one to take the share of its or their parent; and in case all three of said Sarah P., Eveline M., and Catherine, shall be then dead, some one or more of them leaving descendants at the death or marriage of said Elizabeth M., then the said land to be conveyed to the said descendants in fee *per stripes*; but if at the marriage or death of the said Elizabeth M., all of the said Sallie P., Eveline M., and Catherine, shall be dead, and there shall be then no living descendants of any of them, then said land shall be forthwith conveyed back in fee to the grantors. And upon this further trust, that, in the event the said Elizabeth M., shall marry or die before the youngest of said Sarah P., Eveline M., and Catherine, living at such marriage or death of the said Elizabeth M., shall arrive at the age of twenty-one years, or marries, that from such death or marriage of the said Elizabeth M., until the youngest of said Sarah P., Eveline M., and Catherine living, shall ar-

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rive at the age of twenty-one years or marries, in trust for the said Sarah P., Eveline M. and Catharine, but not subject to sale or partition; and if no one of said Sarah P., Eveline M., and Catherine, shall marry or arrive at the age of twenty-one years, then the said land shall be conveyed back in fee to the grantors."

On December 7, 1857, the same grantors, by deed of that date, reciting the previous conveyance, "bargained, sold, released and relinquished to the said Elizabeth M. Currin, her heirs and assigns forever, all and every right or interest, in present or future, that they may have, or might hereafter have, in and to the piece of ground described, and also any and all conditions, limitations and reservations in behalf of themselves, and, so far as they legally may, in behalf of others that may be contained in the deed of the 3d of October, 1853; it being the true intent and purpose of this instrument, so far as the said parties of the first part legally may, to disembarass the said Elizabeth M., of all hindrances in any application that she may make to any court having jurisdiction of the subject-matter, in her own name and that of her said children, for the sale of the land, and the re-investment of the proceeds thereof, in such manner as may be found or decreed to be most advantageous for the interest of herself and her said children."

In the month of March, 1853, a bill was filed in the chancery court of Williamson county, in which county the said Elizabeth M. Currin and her children then resided, by Randall M. Ewing, as guardian of the three children, who were minors, against the mother

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and children for the purpose of having the said land sold because for the interest and necessary for the support of the beneficial owners, such proceedings were had in the cause that a decree was rendered authorizing a sale of the land, but the execution of the decree was postponed from time to time in the hope of an enhancement in the value of the property. At last, when the order of sale was about to be peremptorily enforced, the defendants brought the case into this court, where it was heard on the 29th of February, 1872.

In the meantime, on March 18, 1868, J. & M. House had recovered a judgment in the circuit court of Williamson county against Elizabeth M. Currin and Sarah P. Currin for \$5031.95. On May 19, 1868, an *alias* execution issued on this judgment, and was, on the 25th of the same month, levied upon the interests of Elizabeth M. and Sarah P. Currin in the land in controversy, the levy not stating what the interest of either debtor was. On July 8, 1868, the said Elizabeth M., and Sarah P. Currin filed what is called a supplemental bill in the original case of Randall M. Ewing, guardian, against J. & M. House, for the purpose of enjoining further proceedings under the said execution and levy, until the land could be sold under the decrees in said original cause. An injunction was granted accordingly, which the chancellor refused to dissolve. The proceedings under this supplemental bill was taken up to the Supreme Court at Nashville with the original cause.

Upon the final hearing of these cases by the Su-

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preme Court on February 29, 1872, the court was of opinion that the original bill had been improvidently filed and dismissed it. The court also dismissed the supplemental bill at the cost of the complainants therein. At the same term, W. H. S. Hill, who had been the clerk of the chancery court of Williamson county during a part of the time when the original cause above mentioned was pending in that court, and afterwards a special commissioner in said cause, filed a petition for a rehearing thereof, upon the ground that he had, under the orders of the chancery court, advanced money for the benefit of the said Elizabeth M. Currin and her children, and had an interest in the litigation. The only entry on the minutes of the court at that term touching the petition, is simply that Hill comes and files it for a rehearing of the cause. On February 13, 1875, this petition was dismissed by the court upon the ground that the petitioner was not a party to the cause.

On March 13, 1875, Elizabeth M. Currin and Sarah P. Currin sold and conveyed their interest in the land in controversy to W. H. S. Hill, by deed duly registered, on the 15th of that month. Hill went into possession of the land, and claims under this deed.

On February 17, 1873, J. & M. House transferred to the complainant, Henderson, their judgment against Elizabeth M. and Sarah P. Currin. On the 27th of July, 1875, complainant took out a *renditioni exponas* for the sale of the land under the original levy of the 25th of May, 1868. And, on August 3, 1875, he sued out a *pluries fieri facias* on the judgment. Both

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of these writs seem to have been placed in the hands of the sheriff of Shelby county, who levied the *feri facias* on the interest of the judgment debtor in the land in controversy, describing the interest of Elizabeth M., as a life estate in the whole tract, and the interest of Sarah P., as a remainder in an undivided one-third. On the 18th of October, 1875, the sheriff sold the land at public vendue to the complainant, and afterwards made him a conveyance by separate deeds of the interest of each debtor, reciting the sale as having been made both under the *venditioni exponas* and the *feri facias*. The formal return of the sale is on the *feri facias*.

It sufficiently appears that Elizabeth M. Currin has never married again, and is still living; that Sarah P. Currin and Eveline M., are also living, the latter having intermarried with Bellville Temple; that Catherine Currin is dead, having first made a will, devising her interest in the land in trust for her mother and her sister Sarah. The youngest child, it may fairly be presumed, though the fact does not positively appear, arrived of age before her death. The fact is not material to the complainant's rights, who only claims the specific interest of the execution debtor sold and conveyed to him.

The deed of October 3, 1853, in the events which have happened, conveyed the land in controversy to Elizabeth M. Currin, her heirs and assigns forever, in trust for her own use and benefit during widowhood or life, and, upon her marriage or death, "to be conveyed in fee to her three daughters, or such of them as shall be

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living then," and the child or children, if any, of such as may be dead, who shall take the share of the parent, and if all three of the children be then dead, to the descendants of any of them *per stripes*, and if no descendants, then to be re-conveyed in fee to the grantors. The deed of December 7, 1857, conveys the contingent interest of the grantors to Elizabeth M. Currin. That instrument does not otherwise affect the previous deed.

By the original and subsequent deeds, the fee of land is vested in Elizabeth M. Currin in trust for herself during life or widowhood, and then to be conveyed to her children, or their descendants, as the case may be, living at the termination of her estate, and if no child or descendant, then to her heirs. In other words, there is a trust in fee created to protect the estate for a given time, and to preserve contingent remainder. Such a trust is a special or active trust, not within the statute of uses, nor executed in the beneficiaries under the law as settled in this State: Perry on Trusts, sec. 305; *Hooberry v. Harding*, 3 Tenn. Ch., 677; *Force v. Brown*, 32 N. J. Eq., 118; *Heidenburgh v. Blair*, 30 N. J. Eq., 645. And see *Verdin v. Slocum*, 71 N. Y., 345; *Donovan v. Van De Mark*, 78 N. Y., 244. "The established doctrine of this State is, that trustees take exactly that quantity of interest which the purposes of the trust require: Per McKinney, J., in *Ellis v. Fisher*, 3 Sneed, 234. The question, as a general rule is, not what estate the language used will convey to the trustee, but what interest the exigencies of the trust demand:

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Harding v. St. Louis Life Ins. Co., 2 Tenn. Ch. 647. And *this*, whether the trust be erected by will (*Smith v. Metcalf*, 1 Head, 68; *Bowers v. Bowers*, 4 Heis., 302), or by deed: *Aiken v. Smith*, 1 Sneed, 304; *Williamson v. Wickersham*, 3 Cold., 32; *Park v. Cheek*, 4 Cold., 20. In the case of a deed, it has been held that an express limitation of the trust estate in fee of land will not be cut down to a less estate merely because a fee in the trustee is not necessary for the purposes of the trust, but the limitation must be itself restrained by the terms of the deed to so much of the trust as relates to a lesser estate: *Smith v. Thompson*, 2 Swan; 386, 389; *Watkins v. Specht*, 7 Cold., 585. Whether this distinction is sound or not, there can be no doubt that an express limitation of the trust estate in fee will not be cut down to a less estate when the fee is required for the purposes of the trust: *Gardenhire v. Hinds*, 1 Head, 403. And the fee, as we have seen, is necessary where the object of the limitation is to preserve contingent remainders during the existence of the previous estate, and secure a conveyance of the entire estate upon the happening of the contingency.

An execution, in this State, only operates upon a legal estate: *Springer v. Smith*, 3 Lea, 737. There must be some beneficial interest in the debtor, not a mere naked legal title: *Thomas v. Walker*, 6 Hum., 93. If the legal title and the beneficial interest combine in the same individual, the estate, both by the statute of 29 Charles 2, and by our statutes, may be reached by execution, as in the case of resulting trusts.

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But this doctrine only applies in cases of merger or where the *cestui que trust* has the whole beneficial interest, with the right to call for an immediate conveyance to him of the legal estate: *Russell v. Stinson*, 3 Hayw., 1; Freem. on Ex., sec. 190. It does not apply when the limitation in fee must be kept alive for the purposes of the trust. And there can be no merger where the legal and equitable estates are not commensurate: Perry on Trusts, sec. 13. Or where the merger would be contrary to the intent of the grantor: *Id.* sec. 347. In this view, neither the trust estate, nor the beneficial interest created by the original trust conveyance of the land in controversy could be reached by the execution of the complainant. And the weight of authority seems to be that even a legal contingent remainder is not subject to execution: Freem. on Ex., sec. 178.

This conclusion renders it unnecessary to consider whether the decree of the Supreme Court of February 29, 1872, was suspended, and the injunction against proceedings under the levy of the House execution was kept alive by the filing of the petition by Hill, who was no party to the suits, without any order of the court on the subject; or whether the original levy was abandoned by suing out a new execution. It is probable that both points would be ruled against the complainant.

Affirm the decree with costs.

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E. WHITMORE v. M. T. BALL.

PLEADINGS AND PRACTICE. *New trial. Misconduct of jury.* Upon a motion for a new trial based upon affidavit because of the misconduct of a juror, it is the duty of the court, to examine in open court, the jurors as to such misconduct.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

FINLAY & PETERS for Whitmore.

W. M. RANDOLPH for Ball.

TURNER, J., delivered the opinion of the court.

After verdict in an action for libel, plaintiff in error moved for a new trial, and read his own affidavit stating his grounds as follows: That A. M. Stoddard, one of the jury, after the jury had retired for consultation, stated to it, that to his knowledge, W. L. Trask, who wrote the article in the Ledger about which this controversy is, had prejudice and malice against the plaintiff, because when he had charge of the European Hotel, the plaintiff had refused to give him free dinners or free meals, or free board at his house. That the Public Ledger (which published the article complained of, and of which Whitmore is the owner), had published other articles defamatory of individuals,

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and that he wanted to stop it, that it had published unjust and false articles about a society of which, he (the juror), was a member, and that he had not forgotten it, and that he wanted to punish Whitmore for these things. He further said that the witnesses who had given damaging testimony as to the character of the plaintiff, and of the hotel he kept, he did not believe, that he had lived at the hotel and knew better, etc.

The affidavit further states, such statements made in the jury room, were calculated to mislead and prejudice the jury, and affiant believes did have an important effect and influence on the jury in inducing it to yield to Stoddard's suggestions, and give a verdict for damages. Without them he believes the verdict would have been for him, or merely nominal damages.

The affidavit discloses the names of three jurors from whom the facts of Stoddard's conduct had been learned, but who refuse to voluntarily give their affidavits, but say they will make the statements if called by the court, or as the court may order. The action of the court is set out as follow: "The court refused to permit counsel to examine the said jurors in open court as requested, holding it improper to do so in the absence of affidavits from the jurors themselves, and informed defendant's counsel that the court would wait for an affidavit from a juror, and would consider it, if presented."

The court was then requested to examine the jurors, or any of them, touching the evidence of Stoddard in the jury room. This was refused. The court hold-

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ing it to be improper in the absence of affidavits of the jurors themselves.

That a verdict may be attacked and set aside for the misconduct of a juror, established by the testimony of his fellows, is too well established in this State to be disturbed now. We know of no reason in public policy why it should be otherwise. It certainly has a controlling tendency to insure purity and fairness in jury trials.

The statement of Stoddart, as discovered in the affidavit, were calculated to, and no doubt, did prejudice the jury and incline its minds to a verdict against the plaintiff in error. Treating the affidavit as *prima facie* true, it is certain that Stoddard was the friend and desperate advocate of the defendant in error. That a fair and impartial trial could not be had at his hands. A strong presumption arises that his conduct in the jury room brought about the verdict.

This court has several times said, the better practice is, to examine the juror in open court. Such course gives the adverse side full opportunity to test the witness and place before the court the facts in their true light, no room is left for sliding over or concealing facts, which, if left out of an affidavit, puts on the matter a face wholly different from the truth.

In this case the accusing jurors had refused to make written affidavits, and we know of no rule by which court or counsel could have compelled them to answer questions. In this case it appears that the affidavit had been filed long enough to have given the plaintiff and counsel ample time to examine it and

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prepare to defend against it before the action of the court was invoked, or inquiring into the conduct of the offending juror. This fact excites a decidedly strong suspicion that the facts charged could not be rebutted, and we will look to it as a circumstance in the nature of a confession on the part of the plaintiff below, of the truth of the charges.

Under all the circumstances, we are of opinion the court should have examined the jurors offered, or a sufficient number of them, some of whom were present under subpoena, to have shown the truth or falsehood of the facts charged, and their influence upon the jury in arriving at its verdict. It was within the legitimate power of the court to have compelled the attendance and deposition of each juror. Counsel and parties were powerless to compel written affidavits.

Reversed. Judge Cooper dissents.

LOUISVILLE & NASHVILLE R. CO. v. JANE E. WEAVER.

1. COMMON CARRIER. *Receipt. Evidence* The receipt of goods by a common carrier directed to a place beyond the terminus of the carrier's line, without any limitation of responsibility, is *prima facie* evidence of an undertaking to carry the goods to the place to which they were directed, and renders the carrier liable for their carriage to that point.

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2. **SAME.** *Baggage of passenger.* A carrier contracting, without limitation of responsibility, to carry the baggage of a passenger, and giving a check therefor to a given point beyond the terminus of the carrier's line, becomes liable for the carriage of such baggage in the same way, and to the same extent as the carrier of goods, although the passenger, whose baggage is thus checked, may purchase and travel upon a coupon ticket.
3. **SAME.** *Same.* Where, therefore, the defendant, a common carrier, sold to the plaintiff tickets for herself and family for transportation by railroad from Memphis, Tenn., to San Francisco, California, each ticket having separate coupons for each carrier over whose road the route lay, and gave plaintiff a check for the carriage of her baggage to Omaha, and a loss of baggage occurred before reaching Omaha but after leaving defendant's own road, the defendant was held liable for the loss.
4. **SAME.** *Same.* *Compensation therefor.* The plaintiff at San Francisco applied to the railroad companies whose roads lay beyond Omaha for compensation for the loss, and those companies, while denying all liability, made a deduction upon the plaintiff's return tickets over their roads, in consideration of her release of all claim against them for the alleged loss; it was held that neither the payment nor the release affected the liability of the defendant.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. C. W. HEISKELL, J.

ESTES & ELLET for Railroad Company.

L. B. MCFARLAND for Weaver.

COOPER, J., delivered the opinion of the court.

The judge of the circuit court tried this case without a jury, and rendered judgment in favor of the plaintiff below, Jane E. Weaver, against the Louisville & Nashville Railroad Company for the amount claimed for loss of baggage, and the company appealed.

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The trial judge found that the plaintiff purchased from the agent of the defendant at Memphis through coupon tickets for herself and family from Memphis, Tennessee, *via* Milan, St. Louis and Omaha, to San Francisco, California, and started on the trip May 29, 1877; that her baggage was checked by defendant's agents at Memphis from that city to Omaha; that this baggage was delivered in good order, on the same day, by the defendant to the next connecting road at Milan in this State, and that the loss sued for occurred before the plaintiff with her baggage reached Omaha. The judge further found that the plaintiff, upon discovering her loss after she arrived at San Francisco, applied to the Union and Central Pacific Railroad Companies for compensation for the loss; that the companies denied any liability, but, upon the return trip of the plaintiff in November, allowed her a deduction of between one and two hundred dollars on the cost of transportation over their roads to Omaha, in consideration of her release of all claim against the said Union and Pacific Railroad Companies for the alleged loss, and that the plaintiff agreed in writing to these terms.

The tickets issued by the defendant to the plaintiff contained a separate coupon for each railroad company over whose road she would pass en route, the defendant's road only extending from Memphis to Milan. Each coupon contained a memorandum that it was issued by the defendant, the name of the railroad company owning that part of the line, and the names of the places at which that part of the line commenced

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and ended. The coupons did not purport on their face to be issued by the several companies, nor were they signed with any name. The only signature was that of the general ticket agent at the end of the last coupon. The check given for the baggage was the usual metal check.

The judgment rendered was for the full amount claimed without deduction.

It is well settled that a railroad company, as a common carrier, may contract to carry to a point beyond the terminus of its own line so as to become liable for its delivery at that point, and that the liability thus attaching at the commencement will continue throughout the whole transit, all connecting lines of carriers employed in furthering and completing such transportation becoming its agents, for whose defaults it is responsible: *Railroad v. Stockard*, 11 Heis., 568; *Hutch. on Carriers*, sec. 145. But the courts are not in accord as to what will, *prima facie*, constitute such a contract.

In England the courts from the first adopted the rule, to which they have firmly adhered, that where a railroad company, as a common carrier, receives goods directed to a place beyond the terminus of its own line, without limiting its responsibility by express agreement, such receipt of the goods, so directed, is *prima facie* evidence of an undertaking to carry the goods to the place to which they are directed, and all connecting railroad companies or other carriers along the route are merely the agents of the first company. The latter is alone subject to suit for any loss or

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damage to the goods, the other companies not being responsible to the owner for want of privity of contract: *Muschamp v. Railway Co.*, 8 M. & W., 421. The same rule has been applied to a through contract for the carriage of a passenger and his baggage: *Mytton v. Railway Co.*, 4 H. & N., 415.

The rule, founded as it is on common law principles, has much to recommend it by reason of its uniformity and simplicity, and has been found to work well for the comparatively short distances of carriage in the British island. It has been followed by the courts of a number of States in this country, but modified generally so as to give an action against the carrying company actually guilty of the wrong out of which the cause of action arises, although not the original contracting company. All of the American courts, perhaps, except it may be of Georgia, concur in adopting the English rule, with the modification suggested wherever the contract is clearly a through contract, or the circumstances show that the contracting company has an interest, as partner or otherwise, in the entire route: *Hutch. on Carriers*, sec. 160. The courts of the State of Georgia seem to have adopted the English rule without qualification. Many of the State courts have been led to modify the rule not only in allowing the actually defaulting carrier, other than the first, to be sued, but in the matter of the *prima facie* evidence of a through contract and the burden of proof. The reason of the latter modification may, probably, be found in the greater distances of carriage in this country and the larger number

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of connecting lines. Another cause for the change of the burden of proof may be also found in the form of through ticket, known as the coupon ticket, used by our roads.

The question has been before this court on several occasions. In the earliest of the cases, the suit was brought by a passenger against the first carrier for the failure of the second carrier to comply with the contract. The defendants sold to the plaintiff a through ticket from Nashville to Memphis. The defendants were the proprietors of a stage line for the first part of the route. Another company owned the residue of the stage line to the point where it connected with the Memphis & Charleston Railroad, which ran thence to Memphis. By an arrangement between these three parties, it was agreed that passengers might pay the whole fare at either end of the line, and receive a through ticket. There was no proof to show that the plaintiff knew of the arrangement between the carriers. "We think," says Harris, J., who delivers the opinion of the court, "that when the defendants received the plaintiff's money and gave him a through ticket, they thereby became bound for his transportation on the entire line, and that he was entitled to a strict performance by the defendants of their undertaking, or to recover compensation in damages for any breach thereof. The arrangement between the defendants and the proprietors of other portions of the line was a matter with which the plaintiff had nothing to do. He was no party to that agreement, nor was he bound to look to any person for the performance of the defendants'

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undertaking but themselves. If either party was guilty of a breach, that was a matter for adjustment between themselves. By the arrangement, the proprietors at each end of the line were authorized to receive the fare and give through tickets to show that they had undertaken and received pay for the transportation of the passenger over the entire line, and the proprietors of the other portions of the line were their agents, whom they trusted to perform that part of the contract which lay on that portion of the line owned by them. If this view of the subject be correct, and we think it is, then it was wholly immaterial whether the plaintiff knew of this arrangement or not. If the defendants, when they sold plaintiff the ticket, intended that he should risk the proprietors of the other portions of the line to carry him through, then they should have so stipulated, and informed him frankly of this arrangement, so that he might, with full knowledge of the facts, have elected whether he would pay the entire fare and take through tickets, or pay them only for that portion of the line of which they were the proprietors, and make his own arrangements for the balance of the journey. They assumed, however, to carry him through, and are responsible for the undertaking": *Carter v. Peck*, 4 Sneed, 203.

In the case of the *East Tenn. & Va. R. R. Co. v. Nelson*, 1 Cold., 276, the suit was for the failure on the part of the railroad company to transport wheat, shipped to New York, in due time, under a special contract. "If," say the court, "the carrier, or his servant within the scope of his employment, enter into

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any special contract to deliver in any particular time and place, even beyond the terminus of his particular route, it will be binding."

In the case of the *East Tenn. & Va. R. R. Co. v. Rogers*, 6 Heis., 143, the plaintiff shipped freight at Chattanooga to Atlanta, Georgia, taking a receipt from the defendant of the delivery of the articles "to be forwarded" by the East Tennessee and Georgia railroad, subject to freight and the regulations of the company. The articles, consisting of provisions, were spoiled and rendered valueless by the negligent detention of the agents of a connecting road. A recovery against the first company was sustained. Judge Freeman, who delivers the opinion of the court, notices the conflict between the English and American rulings, and cites the previous decisions of this court. "These cases," he says, "follow the principles of the English decisions, and we think lay down the sounder doctrine on the subject." The rule adopted is that a carrier, by simply taking charge of goods delivered to him for carriage, marked and destined to a particular place beyond the terminus of his own road, without an express limitation of his responsibility, and *a fortiori* if he undertakes in terms to deliver, which is the meaning of the words "to be forwarded," is bound to deliver at the place in due time. "It would," adds the judge, "seriously incommode the business of the country if, when property is shipped by one road and must pass over more than this road in order to reach its destination, the shipper, in case of injury to his goods, is to enquire how many routes, and how many

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different companies make up the line between the place of shipment and delivery, or to determine at his peril which company is liable for the injury."

In the subsequent case at the same term of the *Western & Atlantic R. R. Co. v. McElree*, 6 Heis., 208, the charge of the trial judge in accordance with the rulings in the previous cases was sustained. Judge Freeman, who delivers the opinion of the court, again reviews the conflicting decisions, and after expressing the opinion that the tendency of the later American rulings is in favor of the English rule, adds that the case of *Carter v. Peck* "is an emphatic endorsement of the English rule, and is the proper one in all such cases."

The next case in our reports raised the question of the liability of an intermediate carrier to deliver goods promptly to the next carrier. The goods had been shipped at Philadelphia on the Pennsylvania Central railroad directed to Linton, Kentucky, under a contract which limited the Pennsylvania company to the terminus of its road, "and the proof indicated that the liability of the delinquent road, the Louisville and Nashville railroad, was to be governed by the same contract." Judge McFarland, who delivered the opinion of the court, refers to the two preceding cases as then recently decided, and as holding, "that where there are two connecting lines of railway, and one road receives goods for transportation, marked and consigned to a point beyond the terminus of its own road, but on the line of the connecting road, the road first receiving the goods will be held liable for their de-

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livery at their destination, unless this liability is limited by express contract." "These cases," he adds, "somewhat change the rule followed by perhaps a majority of the American cases, and follow the English rule:" *Louisville & Nashville R. R. Co. v. Campbell*, 7 Heis., 253.

Shortly afterwards, this court heard and disposed of the case of *Furstenheim v. Memphis & Ohio R. R. Co.*, 9 Heis., 238. The plaintiff bought from the Pennsylvania Railroad Company in New York a through coupon ticket from New York to Memphis. He received metallic checks for his baggage calling for Memphis. His coupon ticket was recognized and the coupons taken up by the railroad companies along the route. The proof tended to show that the breaking into the baggage and loss of contents, for which the suit was brought, occurred on the Pennsylvania road. The suit was against the last carrier. Nicholson, C. J., in delivering the opinion of the court, undertakes to discuss the legal import and extent of the contract between the plaintiff and the Pennsylvania Company, concluding thus: "All we have before us is the simple fact that the Pennsylvania Central Company sold plaintiff tickets which were recognized as good along the whole line, and which carried him to Memphis. Without other facts and circumstances proven, we are bound to hold that the Pennsylvania Central Company undertook for itself to transport plaintiff and his baggage to Memphis, and that as there is no privity shown between plaintiff and the defendants, the latter cannot be held responsible for the loss shown to have occurred

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before the baggage reached their road." This conclusion, it will be observed, is also in accord with the English rule, in so far as it requires privity of the contract to sustain an action against any of the carriers other than the one in default.

Afterwards, the direct question of the liability of the intermediate carrier of freight for his own default was raised. A lot of fruit trees was shipped in North Carolina, directed to the plaintiff at Jackson, Tennessee, which the defendant, the Memphis & Charleston Railroad Company, received from a preceding carrier, and failed to deliver to the succeeding carrier because the latter refused to pay the accrued freights. The trial judge instructed the jury that if the defendant received the packages, directed to the plaintiff at Jackson, Tenn., without any special contract limiting their undertaking, the law imposed upon the company the obligation to deliver the goods at their destination, and they would not be excused by the facts relied on. "This," says Judge McFarland, delivering the opinion of the court, "is in accord with the cases recently decided by the court of *Western & Atlantic R. R. Co. v. McElwee & Co.* In these cases the question was fully discussed, and need not be again examined": *Railroad v. Stockard*, 11 Heis., 568.

The question again came before the court at the April term, 1877, at this place. Goods were shipped at Cincinnati, packed in boxes or cases, directed to the plaintiffs at Somerville, Tenn., and delivered to the Louisville, Cincinnati and Lexington Railroad Company. This company gave a receipt, specifying that the goods

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were to be transported, and delivered to the Louisville and Nashville Railroad Company at Louisville, subject to certain conditions noted. One of the conditions was that the liability of the company should terminate upon the delivery of the goods to the next line of transportation. The defendant was the last carrier in the line. The boxes were delivered by the defendant to the plaintiff, who, upon opening them, discovered that some of the goods were missing. It was admitted "that the goods were lost somewhere between Cincinnati and Somerville, but where is not known." It was agreed, upon the authority of *Furstenheim's* case, that the action could not be maintained because there was no privity of contract between plaintiffs and defendant. But it was held that the reason only applied where the loss sued for occurred upon the line of the company with whom the contract was made, and that there was no intimation in *Furstenheim's* case that an action might not have been maintained against the last company for its own default. And it was expressly held that upon the delivery of the goods to the defendant, it became liable for them as a common carrier, subject at most only to the limitations stipulated for on its behalf by the first company. The judgment against the defendant was sustained upon the ground that the defendant admitted the receipt of the goods without objection, and that it was impossible for the plaintiffs to show where the loss occurred. "Upon grounds of public policy," says *McFarland, J.*, in delivering the opinion, "it is better to put upon the carrier the duty of tracing up the loss, and fixing it

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upon the party first liable, than to put the duty on the owner": *M. & C. R. Co. v. Holloway*, 9 Baxt., 188.

All of the foregoing cases recognize the English rule upon the receipt of freight by a carrier directed to a point beyond its terminus, without any limitation upon its liability, but modify it, in accordance with the great weight of American authority, so as to sustain an action against any carrier on the line for its own default. And by the last case it is determined that any carrier in the line is in default, and may be sued for a loss, where the carrier has received the packages or boxes containing the goods without objection. The case of *Carter v. Peck*, the only one which relates to the personal rights of a passenger, and *Furstenheim's* case, the only one relating to the baggage of a passenger, both follow the English rule. A through ticket, without more, would *prima facie* render the first carrier liable upon the contract for the default of the other carriers in the line of transportation in the case of passengers and their baggage, as in the case of the shipment of goods. A through contract as to the passenger will be a through contract as to his baggage, in the absence of a different arrangement. But, as in the case of goods, although the first carrier may contract and be responsible for the entire transportation, any subsequent and auxiliary carrier to whose fault it can be traced will be liable to the owner for the loss of his baggage: *Hutch. on Car.*, sec. 715. The courts of several of the States concur in holding the first company liable for the loss of baggage in the case of a through ticket: *Illinois Central R. Co. v.*

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Copeland, 24 Ill., 332; *Candee v. Penn. R. Co.*, 21 Wis., 582; *Wilson v. Railroad*, 21 Grat., 654; *Burnell v. N. Y. Central R. Co.*, 45 N. Y., 184. But the check for the baggage may be given by one company for part of the line when the passenger has a through ticket from another company, in which case the former will be liable for the loss: *McCormick v. Hudson River R. Co.*, 4 E. D. Smith, 181; *Straiton v. N. Y. & N. H. R. Co.*, 2 E. D. Smith, 184. So, no doubt, the check may, as in the case before us, be issued with the ticket but for only part of the way. In such a case, the check may be considered as standing in the place of a bill of lading for the distance called for, and imposes the duty to carry and deliver accordingly: *Dill v. S. C. Ry. Co.*, 7 Rich., 158; *Wilson v. Chesapeake R. Co.*, 21 Gratt., 654.

It is conceded by the learned counsel of the plaintiff in error in the case before us that, by our decisions as given above, the whole liability in regard to passengers, baggage and freight, is thrown upon the company issuing the ticket or bill of lading, except where an express stipulation to the contrary is shown. But he insists that the rule was changed by *Holloway's case*, 9 Baxt., 188, and *Sprayberry's case*, 9 Heis., 852, S. C. 8 Baxt., 341. But *Holloway's case*, as we have seen, only extends the modification of the English rule, by which the American courts allow an action against the actual defaulting carrier in addition to the first carrier, so as to give the action against any of the carrying companies shown to have received the goods without objection, where it is impossible for the plain-

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tiff to show in what part of the route the loss occurred. And in *Sprayberry's* case, the court, while exonerating the first carrier from liability for the loss of life of a passenger by the negligence of another carrier on the line under the circumstances, decided nothing in regard to the liability for the loss of the baggage, remarking that there were authorities holding that a different rule applied to passengers from the rule applicable to freight and baggage: *Nashville and Chat. R. Co. v. Sprayberry*, 9 Heis., 857. In that case, *Sprayberry* purchased from an agent of the Nashville & Chattanooga Railroad Company at Chattanooga tickets for himself, wife and two children, from that place to Shreveport, Louisiana. The tickets were coupon tickets, and indicated the route to be by the Nashville & Chattanooga road to Nashville, and by other connecting roads to Memphis, and from that point to Shreveport by steamboat. While *en route* on the Mississippi river, and in the State of Mississippi, an accident occurred by which the wife and children were drowned. It appeared in proof that the different lines of road were separate and distinct, owned and controlled by different agents and officers, and that there was no contract or privity between them in regard to carrying passengers except the arrangement to sell through tickets. Under these circumstances, the court held that the first company was not liable to the husband for the damages given to him by a statute of the State of Mississippi for the loss of his wife and children through the fault of the steamboat company. "We are of opinion," says the court, "that in

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such cases the company selling the ticket shall be regarded as the agent of the other lines, *when the tickets themselves import this*, and nothing else appears."

The form of the tickets is not given, but the language of the opinion fairly implies that they showed upon their face the agency of the issuing company, which might be either in words or by each coupon purporting to be the ticket of the company over whose connecting line it was to be used. Such was the form of the ticket in *Milnor v. New Haven R. Co.*, 53 N. Y., 363. The plaintiff bought from the defendant a ticket of two coupons to Sheffield, and received a through check for his trunk. Each coupon purported to be the ticket of one of the two companies over whose roads the passenger was to travel, containing the name of the company, and being signed by different officers. In such a case, each coupon may well be treated as the separate ticket of a company issued by the selling company as agent. In the case before us, the ticket, it will be remembered, is in form the ticket of the defendant, the coupons only designating the company over whose road the particular coupon was to be used, and the termini of the route. If, as suggested by the learned counsel of the plaintiff in error, the presumption of law for or against the first company arises from the form of the ticket, we cannot say that the form adopted, although with coupons, shows it to be anything more than the ticket of the issuing company. It is substantially like the ticket, with three coupons for three several companies, in *Hart v. Rensselaer & Saratoga R. Co.*, 8 N. Y., 37,

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where the baggage of the passenger was checked through, and the defendant held liable for its loss as the company issuing the ticket and receiving the baggage, although owning the last road on the route.

The weight of American authority undoubtedly is that one carrier may sell to a passenger its own ticket, and at the same time the ticket of connecting lines, entitling the passenger to through transportation over all the lines, and may receive the fare for the whole distance, without becoming responsible for the carriage of the passenger beyond its line. The tickets for the several lines are in such cases known as coupon tickets, and each ticket, apparently without reference to the form, being considered as the separate contract of the carrier over whose route it entitles the holder to be carried. The presumption is that the carrier who sells the tickets, nothing else appearing, sells them as the agent of the other lines, and the coupons are regarded and treated as the contracts of the respective carriers, precisely as if they had been sold by the carriers themselves instead of by the common agent: Hutch. on Car., sec. 152, and note. Even in this view, it would not follow that the liability of the carriers for the passenger's baggage would be the same, or governed by the same rule as the liability for the passenger. The reason is obvious. There can never be any doubt as to the carrier by whose fault the passenger is injured, or the personal contract with him violated. While, on the other hand, there may be the same difficulty in ascertaining the carrier at fault in regard to baggage as in the case of ordinary freight. We

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are of opinion, therefore, that the carrier contracting to carry the baggage of a passenger by checking it to a given point becomes liable by the contract for its safe carriage, in the same way and to the same extent as the carrier of goods. The check is in legal effect a bill of lading for the baggage.

In this view, upon the finding of the trial judge that the loss occurred before reaching Omaha, the defendant became liable to the plaintiff for the value of the property taken from the trunks of the plaintiff. It is equally clear that the Union and Central Pacific Railroad Companies, whose roads lay beyond Omaha, were not liable to the plaintiff for the loss, nor in any way in default. Not being co-wrongdoers with the defendant, no payment made by them to the plaintiff, and no release, in consideration of such payment, made by the plaintiff to them, could operate as a release of the liability of the defendant. And the transaction can only be treated as the compromise of a possible litigation, or as a mere gratuity. It would meet the abstract equity of the case to give the defendant the benefit of a credit for the value of the deduction on the return tickets over the roads of those companies, but no principle has been suggested by counsel, or occurred to us, upon which the allowance can be made.

There is no error in the judgment, and it must be affirmed.

Hook v. Donaldson.

J. C. HOOK v. W. T. DONALDSON.

INFANT. *Contract conveying him land is not void but voidable. Ratification.*

A contract in writing, executed by an infant, which conveys to him land in fee, and recites a money consideration secured by the notes of the infant, is not void but voidable only, and unless disaffirmed within a reasonable time after he comes of age, will be binding on the infant, although the notes given for the purchase money may be void because negotiable; and a delay of four years is unreasonable, during the first two of which years the infant paid three of the instalments of the purchase money, and during the last two the land depreciated in value.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

J. M. GREGORY for complainant.

T. B. EDGINGTON for defendant.

COOPER, J., delivered the opinion of the court.

Bill to disaffirm a contract for the sale and purchase of land upon the ground of the infancy at the time, of the complainant, and cross-bill to specifically execute the contract. The chancellor granted the relief sought by the original bill, and the defendant appealed.

The case was transferred to the docket of the commission court of 1879, heard by that court, and the

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decree affirmed June 3, 1879. On August 26, 1879, a petition to rehear the case was filed, and the application was granted, and the case remanded to the docket of this court on Nov. 12, 1879. The order of this court approving the acts of the commission court was entered on Nov. 29, 1879. It now appears that the complainant died on the 24th of July, 1879. The learned counsel of the appellee suggested the query, whether the death of his client does not avoid the subsequent proceedings, and leave the decree of affirmance in full force. But, under the act creating the commission court, its orders and decrees only become binding when approved by this court, and as that approval was had after the death of the complainant, if that death avoided the proceedings of the commission court, it would avoid them altogether. Moreover, the term of the commission court would, in legal contemplation, be as one day, and its proceedings relate to the first day of the term, thereby antedating the death of the complainant for all the orders made.

On the 10th day of January, 1872, W. T. Donaldson, the defendant, sold the lot in controversy to one James T. Evans, in consideration of fifty dollars paid in cash, and the notes of Evans of that date, nineteen in number, payable to Donaldson at intervals of six months, for \$50 each. An instrument in writing was drawn up that day, and signed by both of the contracting parties, which was duly proved and registered, embodying the terms of the contract. By that instrument, Donaldson sold and conveyed the land to Evans in fee, with covenants of general warranty, and the

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other usual covenants, the consideration being set out as above, and a lien being retained for the payment of the notes. It was expressly stipulated that if either, or any part of either of said notes should not be paid when due, then all of the notes unpaid should immediately become due for the amount expressed on their face, less a discount at the rate of six per cent. for the time they had to run, and one D. P. Davis, after advertising as prescribed, might sell the land in satisfaction thereof.

Shortly afterwards, Evans sold his interest in the trade to complainant Hook, in consideration of the payment to him by Hook of the fifty dollars cash paid by Evans to Donaldson, and the delivery up to him of his notes to be replaced by the notes of Hook to Donaldson of the same date, for the same amount, and having the same time to run. Donaldson consented to this arrangement, and, on April 22, 1872, an instrument in writing was drawn up, signed by Donaldson, Evans and Hook, reciting the facts, and embodying the terms of the agreement. By this instrument, Donaldson and Evans "sell and convey" the lot to J. C. Hook, "his heirs and assigns forever," with all the covenants of the original deed to Evans, and it is provided that D. P. Davis shall have the same power of sale in case of default of the payment of the new notes, as in the original deed. This instrument was also duly proved and registered.

In July, 1872, complainant paid to the defendant Donaldson the amount called for by the first of his notes, which then fell due. He was then under age,

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although the fact was not then known to the vendor, and he was working for himself, controlling his own wages. He came of age on the 27th of October, 1872. Afterwards, he paid, as they fell due, the next three notes, maturing January 10, 1873, July 10, 1873, and January 10, 1874. In the month of August, 1874, the defendant sued the complainant before a justice on the unpaid notes then due, and the defendant pleaded in defense that he was an infant at the execution of the notes. It was then agreed by the parties, that the suit should be dismissed, and that the complainant would file a bill, whereby the matters in dispute could all be settled in one suit. The present bill was accordingly filed on August 19, 1876.

The instrument of the 22d of April, 1872, is an absolute conveyance of the lot in controversy by the defendant Evans to the complainant in fee, reserving a lien for the security of the purchase notes. It is an executed contract as far as the grantors are concerned, and clothed the complainant with the title to the land. It is common learning that an infant may receive and hold real estate, the same as an adult: Bish. on Con., sec. 263. For *prima facie* the conveyance is to his interest. The same is true of a married woman, although she cannot bind herself for the purchase money either by note or contract. And we have expressly held, notwithstanding the disability of a married woman to contract, that by the acceptance by her of a deed of conveyance of land, in which a lien is retained for the payment of the purchase money, she becomes clothed with the title to the land subject

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to such payment. The contract is executed, and she is not entitled to have the purchase money paid refunded. The vendor may enforce the lien reserved for unpaid purchase money, although he cannot recover a personal decree therefor, and although the notes and the contract for the purchase money be executory, and not binding on the married woman: *Willingham v. Leake*, 7 Baxt., 453; *Jackson v. Rutledge*, 3 Lea, 626. If the grantee be not disabled to contract, the delivery and acceptance by him of a deed to land, not only clothes the vendor with the right to charge the land with the purchase money, but creates a personal liability on the part of the grantee to pay the purchase money as recited in the deed: *Trezevant v. Bettis*, 1 Leg. Rep., 48; *Lee v. Newman*, 1 Memphis L. J., 139; *Holbert v. Edens*, 5 Lea, 204. An infant is not, like a married woman, incapable of making a binding personal contract. On the contrary, the general rule is that he may contract. His contracts are voidable, and only void in exceptional cases: *McMinn v. Richmonds*, 6 Yer., 9. Even if his negotiable promissory note be void, he may be liable for the consideration evidenced by the note, or for which the note was given: *Id.*; *Reed v. Boshears*, 4 Sneed, 118. And he may make a conveyance of land in mortgage to secure a debt contracted by him, such conveyance being only voidable not void: *McGan v. Marshall*, 8 Hum., 121. He may, therefore, accept a deed for land, and contract therein for the payment of the purchase price, and that the purchase money shall be a lien on the land. Such an instrument executed by

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an infant is not void, but voidable: *Wheaton v. East*, 5 Yer., 41; *Scott v. Buchanan*, 11 Hum., 468. The notes may be void, but the contract and the consideration are merely voidable.

The only question in the case admitting of any discussion is whether the complainant is entitled, under the circumstances of the case, to disaffirm this *voidable* contract by reason of his infancy. And it has not been contended that he can, if the contract be only voidable. The theory of the bill, and of the argument submitted on complainant's behalf is that the notes executed for the purchase money were void, and that the contract for the land was only collateral and executory. The complainant paid three of the instalments of purchase money after he came of age, well knowing all the facts, and virtually admits in his bill and deposition that he became aware of his right to disaffirm by reason of his infancy when he ceased to pay the instalments, which was in July, 1874. It was not until more than two years thereafter that he gave the vendor notice, by pleading infancy in the action at law, that he desired to disaffirm. In the meantime, as the proof shows, the lot in controversy, which was worth at the time of the contract and also in July, 1874, the purchase price, had depreciated in value about one-half. This court has repeatedly held that the voidable contract of an infant is confirmed by his failure to disaffirm in a reasonable time, and this for the obvious reason that the other party cannot set up the infancy as a ground of rescission, and that it would be a fraud upon such party to be sub-

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ject for an indefinite period to the right of election of a person *sui juris*: *Wheaton v. East*, 5 Yer., 41; *Scott v. Buchanan*, 11 Hum., 476. It was long ago held that if an infant execute a partition deed, and, after he arrive of age, hold over or occupy his part, it would be a confirmation: Co. Lit.t, 171, b. It is also settled law, in the analogous case of a contract vitiated by fraud, that any act of the party entitled to take advantage of the fraud, by which, after knowledge of the fraud, he treats the contract as subsisting, will be an affirmation. There can be no rescission afterwards: *Knuckolls v. Lea*, 10 Hum., 377; *Gilbert v. Hunnewell*, 12 Heis., 289; *Summers v. Wilson*, 2 Cold., 469.

The decree must be reversed, the original bill dismissed with costs, and a decree rendered here upon the cross-bill for the amount of the unpaid purchase money reduced according to the contract, and all the costs of the cause.

Randolph & Jenks v. Merchant's Bank.

RANDOLPH & JENKS v. MERCHANT'S NATIONAL BANK
OF MEMPHIS *et al.*

1. SUPREME COURT. *Can only adjudicate upon matters raised by the pleadings.*
The courts can only adjudicate such matters as are properly brought before them by the parties in the mode prescribed by law and the practice of the court; they cannot notice matter, however clearly proved, of which there is no allegation or issue in the pleadings; and the Supreme Court has no more power than the lower courts to pronounce a decree upon matter outside of the record.
2. COLLATERAL SECURITY. *Pledgee or assignee. His rights and powers.*
A pledgee or assignee of collateral security, with authority to settle with the parties liable on such securities, may, in good faith, compound the debt, and will only be liable for the actual amount due to the assignor from such parties; and, although ordinarily a change of security would not be allowable which was not plainly advantageous, yet the assignee, who has an interest in the fund, and acts in good faith under the advice of counsel, would not be liable under the circumstances except for an abuse of trust.
3. SUPREME COURT PRACTICE. *A cause will not be remanded. When.* A cause will not be remanded for the purpose of bringing new parties before the court after a protracted litigation, unless the applicant's right to relief be clear.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

R. J. MORGAN and GREER & ADAMS for complainants.

W. D. BEARD for defendants.

COOPER, J., delivered the opinion of the court.

The original bill in this case was filed, on the 29th

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of November, 1867, by the complainants, citizens and merchants of Philadelphia, Penn., against the Merchant's Bank of Memphis, and two of its officers, the latter being made defendants for the purpose of obtaining the discovery asked for under oath. The case made by the bill was that the complainants, by arrangement with O. C. Boone & Co., a commission firm at Memphis, had been in the habit of accepting the bills of exchange of the latter firm, based upon shipments of cotton, drawn upon them with bills of lading of the cotton attached, and negotiated through the defendant bank; that in June, 1867, Boone & Co. drew upon them two drafts, one for \$8,100, and the other for \$1,800, both apparently secured by shipments of cotton, and bills of lading attached, which drafts were forwarded by the defendant bank, accepted and paid by complainants; that the supposed bills of lading turned out to be fictitious, and Boone & Co. had become insolvent. And the complainants sought to recover the money advanced by them, from the Merchant's Bank upon the ground that the bank had guaranteed the payment of the drafts, or were interested with Boone & Co. in the transactions, or had colluded with that firm in the fraud. Such proceedings were had in the cause that upon final hearing the chancellor gave the complainants a decree against the bank for \$1,152, being the value of the cotton which the bank had guaranteed should be forwarded as a margin upon the larger bill of exchange, with interest, the other issues being found in favor of the defendant.

In the progress of the case, the deposition of O.

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C. Boone, the leading partner of Boone & Co., was taken. He testified that he had transferred to the Merchant's Bank certain assets of Boone & Co., to secure the bank from loss on the paper of the firm which it held. He further stated that, after the filing of complainant's bill, when sent for by W. H. Cherry, the president of the bank, he had agreed that the bank might hold the collaterals to indemnify it against any recovery in the suit, remarking at the time that they were probably sufficient to pay the bank, and also the debt due to complainants. He was then asked whether he did then or subsequently transfer to the bank or its president any securities to pay complainants' debt. His answer was: "Never specially for that purpose. It was to pay Randolph & Jenks and the Merchant's National Bank. I don't say that I told Mr. Cherry that, but that was my intention." He added: "I considered the whole thing as the Merchant's National Bank's, and they responsible for it. I mean that the bank would have to pay Randolph & Jenks ultimately."

No mention had been made in the bill or answer of any collaterals held by the bank, nor any suggestion that the bank might be indebted to Boone & Co., nor any prayer for an account, nor were Boone & Co. parties to the suit. Nevertheless, the decree of the chancellor contained the following provisions: "It further appearing to the court that O. C. Boone or O. C. Boone & Co., for the purpose of securing their indebtedness to the Merchant's National Bank, and as an indemnity and security for the payment of the

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claims of complainants, turned over to said bank various and divers assets, consisting of claims, choses in action, etc. And it appearing to the court that complainants are entitled to have an account from said Merchant's National Bank, to the end that any and all such assets and effects may be applied under and according to the trusts on which they were placed in possession of the bank, and of its duly authorized officers. It is therefore accordingly ordered and decreed by the court that a reference be, and the same is hereby directed to the clerk and master of this court, who will take and state an account with said bank in respect to the securities placed in its possession by said O. C. Boone & Co. or O. C. Boone, and report fully as to the rights of the parties in respect to said matters."

From this decree, the complainants took an appeal to this court, where the cause was heard and determined at the April term, 1874. The opinion then delivered is reported in 7 Baxt., 458. From this opinion it appears that the only question considered by the court was the extent of the bank's liability to the complainants under the allegations of the bill. The decree at first drawn up and entered was limited accordingly. A few days afterwards, another entry was made on the minutes, remanding the cause to the chancery court "for the taking of the account as to the assets of O. C. Boone & Co. in the hands of the Merchant's National Bank, and for any proper decree in reference thereto."

On July 17, 1877, after the cause was remanded,

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the complainants filed an amended and supplemental bill, the sole object of which was to bring the Metropolitan Bank of New York before the court, as the assignee or principal holder of the assets of the Merchant's Bank, and, upon an allegation that the Metropolitan Bank was about to remove said assets, to impound them to the extent of the collaterals mentioned. Such proceedings were had in the cause that the master took the account ordered and made a report. Exceptions were filed by both parties, which were acted upon by the chancellor, and a decree rendered in favor of the complainants against the Merchant's Bank for \$16,987.73. The Merchant's Bank has brought the case to this court by writ of error.

The object of the original bill was to hold the bank liable to the complainants for the money paid by them on the faith of the fictitious bills of lading. The prayer of the bill was that the defendant bank, or the other defendants its officers, be decreed to be liable to the complainants for the amount of the drafts mentioned, and that the same be collected by execution; and, at all events, that said bank be declared to be bound to them upon the guaranty of said draft, or a portion of the same. O. C. Boone & Co. were not made defendants, nor of course was any relief sought against them. Neither in the bill, nor in the answer was any statement or allusion made as to any collaterals placed in the hands of the bank or its officers for any purpose. The existence of such collaterals was developed in the proof. The decree of the chancellor in reference to these collaterals, and the

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subsequent order of this court, if intended to be in affirmance of that decree, were not justified by anything in the pleadings. It also appears in the proof taken upon the reference, after the remand, that the members of the firm of O. C. Boone & Co. went into bankruptcy, and the assets in controversy seem to have been sold by the assignee, and the purchaser has brought suit against the Merchant's Bank therefor. Under these circumstances, the first point made by the appellant is that the whole proceedings were *coram non judice*, and void.

It is an elementary principle that the courts can only act upon such matters as are properly brought before them by the parties, according to the settled law, practice and usage: *Windsor v. McVeigh*, 93 U. S., 282. The court cannot rightfully notice matter, however clearly proved, of which there is no allegation or issue in the pleadings: *Sheratz v. Nicodemus*, 7 Yer., 13; *Bedford v. Williams*, 5 Cold., 207; *Furman v. North*, 4 Baxt., 296; *Austin v. Ramsey*, 3 Tenn. Ch., 118. No relief can properly be granted in chancery upon any matter which does not appear either in the bill or the answer: *Rogers v. Breen*, 9 Heis., 679. And this court [has repeatedly held that it has no more power than an inferior court to pronounce a decree binding on the parties upon matters which are not brought before it in the regular mode for adjudication, but are entirely outside of the cause: *Easley v. Tarkington*, 5 Baxt., 592; *Meredith v. Little*, 6 Lea, 517; *Hill v. Hillsman*, 7 Lea, 197; *Pettit v. Cooper*, opinion in MS. at this term. It is obvious, therefore, that

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the original decree of reference to the chancellor, and the order of this court so far as it was in affirmance thereof, were without authority, and void.

It may be, however, in view of the tacit acquiescence of the parties in what was done, that the cause should be remanded, if desired by the complainants, in order to amend the pleadings, and bring the proper parties before the court. To this end, the merits of the case have been looked into. The balance found against the Merchant's Bank by the chancellor's decree consists entirely in two items of charge, both of which was brought before us by the writ of error. It is absolutely certain that not a dollar was ever received by the bank upon the largest of these items, and the weight of testimony is that only a small part of the other was collected. The chancellor was, however, of opinion that the bank must be held liable for the nominal amount of both, because it was a pledgee without authority to settle. In this, he was clearly in error.

The lawyer who drew up the assignment from Boone & Co. to the bank of many of the claims transferred as collateral or pledged, including the Dale claim one of those in dispute, testifies that: "All of said accounts then so assigned was made out in full against the said parties as from the books of O. C. Boone & Co., but the true amount of neither was then fixed by a final settlement with the parties thereto." Boone says: "Of course there was a settlement to be made by Cherry with Dale." And both the attorney and Boone say that this claim was settled with the party

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by the bank, and Boone's testimony, not only shows knowledge on his part of the settlement, but fairly implies that it was in pursuance of authority conferred at the time of the assignment. And the whole evidence of this witness leaves no room for doubt that the bank, or W. H. Cherry its president, had full authority to do the best that could be done with all the claims for the purpose of indemnifying the bank, and Cherry individually, against loss on the debt of Boone and Boone & Co. to them. The bank was really a trustee, and not merely a pledgee, if, indeed, there be any difference in the liability incurred by the course pursued in realizing the assets.

A trustee, acting in good faith, may release or compound a debt due to his trust estate: *Blue v. Marshall*, 3 P. W., 381; *Firshaw v. Higginson*, 8 D. M. & G., 827. But if he releases or compromises a debt without sufficient reason or justification, or if he sell a debt for a grossly inadequate consideration, when by proper diligence more could have been realized, he will be answerable for it in his accounts: *Jevon v. Bush*, 1 Vern., 342; *Wiles v. Grebham*, 5 D. M. & G., 770; *Perry on Trust*, sec. 482. A trustee must follow the collection of claims actively by legal proceedings, unless he can show that such proceedings would have been futile and void: *Perry on Trusts*, sec. 440. A pledgee, like a trustee, is bound to the pledgor for the full amount of the asset pledged, if it can be realized by law, and if the pledgor is entitled, as between him and the debtor, to the full amount of the asset. But if the pledgor himself only holds the asset to

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secure a given indebtedness, his pledgee can claim no more against the common debtor, and will be liable to that extent to the pledgor: *Cherry v. Frost*, 7 Lea, 1.

The note of Dale, transferred to the bank or Cherry as collateral, was for \$3,150. But as we have seen, the claim of Boone & Co. against Dale was subject to a settlement. Boone admits that as early as January, 1868, he was advised that a settlement had been made between Dale and Cherry. And the attorney, who drew the transfer for Boone, states that he learned from Dale the same fact, and that Dale had the note. Neither of these witnesses state the result of the settlement. On the other hand, Cherry testifies that, upon the settlement, it was found that only \$632 was due from Dale, and this sum was paid to him. There cannot be a reasonable doubt of the correctness of the testimony of Cherry.

The other, and much the largest claim in dispute, consisted of the note of one Burgett for \$6,768. The note was payable to Mrs. Grider, and by her and her husband endorsed. The proof of Cherry and Grider, the husband, is that the note was deposited by the husband with Boone & Co. as collateral to secure a debt of \$1,600. Cherry says he learned the fact from Grider, shortly after he received the note, and called Boone's attention to it, who admitted it, except he thought the claim of the company was for about \$2,000. Cherry sent the claim for collection to a lawyer in Arkansas, where the maker and the Griders lived, and went himself to consult with the lawyer in regard to its value. He was informed, and the proof sustains

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the information, that the maker and endorsers were worthless. Under the advice of counsel, upon the idea that he might be able to collect the smaller sum, Cherry surrendered the note to Grider, for the note of himself and wife for \$1,600, which has never been paid. It turns out that Burgett had bought Mrs. Grider's interest in land, and had given a note for the purchase money which was secured by a lien on the land reserved in the face of the deed. The note in dispute was, however, not the note mentioned in the deed, but another note given some months afterwards for a different amount, but including the consideration for the land. Mrs. Grider was the sister of Burgett, and the land was sold by her to him, and the first note executed to her in her maiden name. These facts were not known to Cherry, nor to his lawyer, nor it would seem to Boone. After the note in controversy was surrendered to Grider, it was paid by another brother of his wife, who took the land. Under these circumstances, it is clear that the bank would, at most, only be liable for the actual indebtedness for which Boone & Co. held the note, which the weight of testimony shows was \$1,600. The bank and Cherry had every inducement to secure the amount due upon the claim, and, although a change of securities would ordinarily not be allowable which was not plainly advantageous, we cannot say that there was an abuse of trust in surrendering the note, under the advice of counsel, and taking another note which the counsel thought might be collected. It seems, that Grider had an equity of redemption in certain other

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realty, or rather an interest in the realty subject to a prior debt, and the expectation of counsel was to reach that interest, and perhaps the amount of the debt was important in obtaining a speedy judgment. That property was absorbed by the debt, and nothing realized. Boone testifies that in addition to the claim of Boone & Co. against Grider, which he puts at a higher figure than Cherry, for which Boone & Co. held the Burgett note, the firm of Dobbins, Pleasants & Co., of New Orleans, had a large amount against Grider and wife, for which the note could have been held. This firm, the proof shows, failed before Boone & Co., and it is clear that the complainants Randolph & Jenks, as creditors of Boone & Co., could have no claim upon this asset by reason of any accounts of Dobbins, Pleasants & Co. Besides, no such account is shown, and the testimony of Boone & Co. is not sufficiently definite, nor does he come before the court in such an attitude as to justify the court in giving much weight to his evidence. In the conflict of testimony between him and Cherry, the latter is entitled to the most credit.

If the Burgett item be disallowed, and the Dale claim reduced to \$632, there is no balance due from the bank. The balance would be the other way. And to justify a remand, the right to relief upon an amendment of the pleadings ought to be clear.

Reverse the decree, and dismiss the bill as to the matters of account, with costs.

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J. W. RICHARDSON, Adm'r, v. JOHN W. KEEL *et al.*

LIMITATION, STATUTE OF. *Administrator. Distributee.* The share of a distributee in either personal or real estate cannot be appropriated by the administrator to a debt claimed to be due from the distributee to the intestate, shown to be barred by the statute of limitation, when the defense is pleaded and relied upon.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

JARNAGIN & FRAYSER for complainants.

HEISKELL, WEATHERFORD & HEISKELL for defend-
ants.

McFARLAND, J., delivered the opinion of the court.

The original bill in this case was filed to administer the estate of E. T. Keel, deceased, as an insolvent estate—the insolvency having been suggested. In fact, however, as may be inferred from the allegations of the bill and subsequent proceedings, the estate is not insolvent, though the allegations are that the personal estate will be insufficient to pay the debts.

Sometime after the bill was filed, to-wit, on the 24th of February, 1881, the administrator filed what is styled a petition in the cause against Samuel Keel, a son of the intestate and an heir and distributee of

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his estate, setting up that said Samuel was indebted to the intestate in the sum in the amount of two accounts; the first for the sum of \$4,547.12, "by account current down to December 3, 1873"; the other by "account current after that date down to August 6, 1876, for \$2,636.05." Petitioner avers that he knows of nothing belonging to said Samuel (who is non-resident) within the jurisdiction of the court out of which to collect said debts. He therefore prays that he have a decree for the satisfaction of these debts out of the distributive share of said Samuel in his father's estate, if the estate prove insolvent, and also that it be declared a lien upon said Samuel's share of the real estate. No attachment, however, was prayed for or issued. Samuel Keel answers the petition, without objection to the form of the remedy. He pleaded the statute of limitations of six years to the first account; admitted the correctness of the second, but set up matters of set-off and counter claim thereto. The matter was referred to the master, who reported the first account barred by the statute of limitations, and after allowing the defendant certain matters of set-off, reported a balance against him on the second account. The complainant excepted to the report, that the first account was barred by the statute of limitations. The solicitor of two of the other distributees moved to have the account re-committed upon an affidavit, which, although in the transcript, was not made part of the record by the bill of exceptions. The chancellor, upon hearing, refused to re-commit the matter, held that the first account was barred by the statute of limita-

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tions of six years, and that the defendant was protected from a recovery on said account; *but that the complainant, as administrator, should retain the distributive share of said defendant in the personal estate to the full extent of said account if necessary for its payment.* He denied the complainant, however, all right to go upon said defendant's share of the realty for the payment of said account.

The decree was against said Samuel for the balance reported against him on the second account, and in this respect there was no appeal.

The complainant specially appealed from that part of the decree holding the demand as to the first account barred by the statute of limitations, and denying the lien claimed for its payment upon the defendant's share of the realty descended. The defendant appealed from that part of the decree allowing the administrator to retain his (defendant's) distributive share of the personalty in payment of the barred account.

The account in question was undoubtedly barred by the statute of limitations of six years. It accrued, according to the allegations of the petition and all the proof, on and before the 3d of December, 1873, when it was finally closed. The other account was opened several years afterwards, and had no connection with the first. The intestate died 12th October, 1879. Administration was granted November, 1879, and the petition in this case filed the 24th February, 1881. This petition, however it be regarded, was the beginning of the suit on the account; we express no opin-

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ion as to the propriety of adopting this form of proceeding. No objection having been taken to the form, it may be treated as an original bill, as only in this aspect can it in strictness probably be maintained at all. Although the defendant, Samuel Keel, was a party to the original insolvent bill, it was only as heir and distributee.

No allegation was made in that bill in regard to those debts, and could not properly have been made, for while an insolvent proceeding contemplates that all the creditors should be made or become parties, it does not contemplate that the debtors of the estate should also be made parties for the purpose of collecting the debts. So that the insolvent bill was not the beginning of a suit on the account; but even if it be so considered, the result is the same, as it was not filed until the 21st of April, 1880. There was no attempt to show a new promise or otherwise take the account out of the statute.

The chancellor was, therefore, clearly correct in holding that the suit as to the first account was barred. It seems to us equally clear, however, that his holding that the administrator might, nevertheless, appropriate the distributive share of the defendant in the personal estate of the intestate to the payment of the account, is erroneous. We do not perceive the principle upon which it can be held that while suit upon the claim is barred by the statute so that there can be no judgment or recovery upon it, yet the administrator may appropriate the effects of the defendant which he holds in trust for him, to the payment of

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the barred debt. There is nothing in the fact that the debtor, by the death of the creditor, becomes a distributee of his estate. It is indicated in the briefs filed that the holding of the chancellor was based upon the case of *Smith v. Gooch*, 5 Lea, 536. But there is nothing in that case to justify such a holding. That was a bill by the distributees of a deceased idiot against the administrator of his guardian. The administrator sought to reopen the settlement of the guardian for the purpose, among other things, of being relieved of certain insolvent notes with which the guardian had charged himself. One of these notes was upon a brother of the idiot, who, upon the death of the latter, became one of the distributees. The opinion holds that the settlement of the guardian should not be reopened, for the reason, among others, that the guardian had not, in his inventory of the notes, claimed that any of the notes were insolvent or doubtful, except in a settlement made some years afterwards the one note referred to is reported insolvent, but a still later settlement included the note and made no claim that it was insolvent, and there was proof that at a still later period the maker of the note was solvent. After stating these facts, the opinion add: "At all events, C. P. Gooch," (the maker of the note in question) "is one of the distributees, and to the extent of his share (which may cover the amount of his note) it will be available." This remark in the opinion seems to have been regarded as a holding that the distributive share of the maker of the note could be applied to its payment, notwithstanding the note was barred by the

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statute of limitations. This seems to be inferred from the fact that the dates of the settlements given in the opinion, in which the note was included, show that the note was in existence for a period long enough to have created the bar of the statute, and hence the head note seems to regard the point decided.

But the opinion makes not the slightest allusion to the statute of limitations as a defense to the note. It is not clear that the question was so presented or in issue, that the court could have adjudged the liability of the maker of the note, or that it intended to do so. The opinion was only giving reasons why the credits claimed by the guardian should not be allowed, and had given ample reasons, independent of the remark referred to, and then assumed as an additional reason, that the note could be realized out of the distributive share of the maker. But conceding that the opinion intended to adjudge that the note of C. P. Gooch should be deducted from his distributive share in the account which was prayed for and ordered between the distributees, still such an adjudication might well rest upon wholly different grounds from the one indicated.

Whether the court made the adjudication upon the ground that C. P. Gooch had not pleaded the statute, or had admitted his liability and willingness to pay the debt, or that the so-called "note" was a "bill single" under seal, made before the abolishment of private seals, as to which no limitation applied; or that it had been renewed, or that there had been a promise to pay within the period of limitation, or that the original note was payable to the idiot, the opinion

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does not show. At all events there is nothing in the opinion indicating that the court intended to hold that if the debtor was protected by the statute of limitations from a recovery on the note, his distributive share of the estate might yet be applied to its payment. Such a construction of the opinion is unauthorized. It would have been inadvertent and erroneous if so held.

One species of property can no more be taken than another to pay a debt which the law does not recognize as valid security. The defendant's distributive share in his father's estate is as much his property as any other he may own. The case of *Caldwell v. Powell*, 6 Baxt., 82, has no application. That case was decided upon the ground, in substance, that there had been an agreement to set off the mutual demands before either was barred, and this was enforced, although before suit was brought the time necessary to bar the set-off had elapsed.

Finally, it is insisted that the defendant should be held liable for the amount of the account as an advancement, but is distinctly charged to be a debt, and so to have been regarded by both parties.

The decree of the chancellor will be reversed, with costs, upon the point indicated.

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M. A. MCCOMBS v. GUILD, CHURCH & CO.

1. JUDGE, SPECIAL. *Appeal. Quere*, whether an appeal lies from the judgment of a special judge, selected by the parties merely because the regular judge was engaged in the dispatch of other business, where the record shows the fact, and that the bill of exceptions and judgment were signed by the special judge.
2. CONTRACT. *Sale of personal property. Possession passes to purchaser and title to remain in seller. Sub-vendee.* A contract for the sale of personal property, by which the possession passes to the purchaser, but the title remains in the seller until the purchase money be paid, is valid, and the contract, although reduced to writing, need not be registered. As between the original vendor and a sub-vendee in such a case, it is a question of title, and neither the payment of the price, nor want of notice of the vendor's right will protect the sub-vendee from the claim of the owner.
3. SAME. *Same. Sub-vendee. Rights of where there is power to convey.* Exceptions to the rule in favor of the sub-vendee may exist where the possession of the purchaser is coupled with the usual *indicia* of title and authority to convey; or with an apparent power to sell superinduced by the acts of the vendor; or, perhaps, where the conditional sale is made with knowledge to a regular dealer in the article.
4. SAME. *Same. Same.* The case falls within the rule, and not the exception, when the plaintiffs, citizens of Boston, Massachusetts, sold a piano to a resident of Memphis, Tennessee, by contract in writing, stipulating for the payment of the price by instalments, that the chattel should remain the property of the plaintiffs until the price was paid, and that the vendors should have the right to take back the piano if the purchaser should fail to pay, or should sell, mortgage or convey the same in any manner without the written consent of the vendors, the proof merely showing that the purchaser brought the piano to Memphis, kept it for sale in a store where he had other pianos, and sold it, without the knowledge of the plaintiffs, to the defendant, who had no notice of the plaintiff's rights, for value.
5. PLEADINGS AND PRACTICE. *Tort may be waived and suit be for value. Limitation.* The owner of personal property may waive the tort in its

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conversion, and sue in contract for its value, in which case the limitation of the action will be that for causes of action in contract, although the title to the property may, before suit, have become vested in the wrong-doer by lapse of time.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

ESTES & ELLETT for McCombs.

W. STRONG and W. M. RANDOLPH for Guild, Church & Co.

COOPER, J., delivered the opinion of the court.

This action was commenced by Guild, Church & Co., against M. A. McCombs, before a justice of the peace by warrant, "in a plea of debt by account." Upon appeal to the circuit court, the regular judge being engaged in the trial of a cause, the parties agreed that the cause might be tried by C. W. Heiskell, an attorney of the court, as special judge. This is the substance of one entry on the minutes. The bill of exceptions says that the parties agree to submit the case to C. W. Heiskell, Esq., "appointed by the court, with the consent of both parties, a special judge," without the intervention of a jury, the judgment to be entered as the judgment of the court, "both parties reserving the right to appeal from the same to the Supreme Court as if the case had been regularly called and tried by the circuit judge." The special judge rendered judgment for the plaintiffs below, and

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the defendant appealed in error. The bill of exceptions and the judgment of the court are signed by the special judge.

The first point made is that the judgment is not one from which an appeal can be taken. But no motion was made to dismiss the appeal, and a majority of the court think that the objection comes too late. I have grave doubts of the jurisdiction of the court in such a case.

On September 25, 1875, the plaintiffs, in Boston, sold to C. S. Cooper, of Memphis, Tennessee, a piano at the price of \$325, of which \$27.12 were paid in cash, and the residue secured by eleven notes of the purchaser for \$27.08 each, payable at intervals of a month for the next eleven months, with 7 per cent interest. The contract, which was in writing signed by the purchaser, provided that the piano should remain the property of the plaintiffs until all of the payments were made, with the right on their part, in case of failure to pay, or if the purchaser should "remove the same from the house No. —, or sell, mortgage or convey the same in any manner, without their written consent," to take the piano back. The purchaser brought the piano to Memphis, and kept it "in a sewing machine store for sale, where persons desirous of purchasing pianos examined and tried it; he also kept other pianos there." On October 3, 1875, Cooper, through one L. Schunck, sold the piano to the defendant for \$500, which was paid in another piano worth \$100, and the residue in cash. The defendant had no knowledge of the contract between

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plaintiff and Cooper, but bought and paid for it believing that Schunck and Cooper were the absolute owners. She has had possession of the piano since her purchase. The plaintiffs had no knowledge of the sale to the defendant. They made no demand of the defendant for the piano until March, 1879, when defendant was told by the agent of the plaintiffs that he had the purchase notes for collection, and, as they had not been paid, that Cooper had no title to the piano; that if defendant wished to keep the piano she must pay for it, or, if she preferred to return the piano, he would accept it in payment. The piano is worth \$325. The plaintiffs, who reside in Boston, Massachusetts, had permitted Cooper to bring the piano from Boston to Memphis, and had not put the agreement of sale on record, or made any advertisement in Memphis, or otherwise given notice that the title of Cooper was not complete.

It has uniformly been held in this State that a contract for the sale of personal property, by which the possession is delivered to the purchaser but the title retained in the seller until the purchase money be paid, is valid, and if the purchaser dispose of the property before the title is vested in him by the payment of the purchase money, the original owner may follow it into the hands of the third party: *Houston v. Dyche*, Meigs, 76; *Gambling v. Read*, Meigs, 281; *Price v. Jones*, 3 Head, 84; *Holmark v. Molin*, 5 Cold., 482. And although the contract of sale be reduced to writing, it need not be registered: *Bradshaw v. Thomas*, 7 Yer., 497; *Buson v. Dougherty*, 11

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Hum., 50. As between the original vendor and sub-vendee in such a case it is a question of title, and neither payment of the price nor want of notice of the vendor's right will protect the sub-vendee: *Price v. Jones*, 3 Head, 85. Taking possession and assuming control of the property as owner, would be a conversion: *Houston v. Dyche*, Meigs, 76. Demand of possession and refusal are required only in those cases in which the possession was rightfully acquired: *Merchants National Bank v. Trenholm*, 12 Heis., 524.

In *Gambling v. Read*, it was said by the court that possession of personal property is only *prima facie* evidence of title, and will not protect the purchaser against the claim of the true owner, except in a few cases provided for in law, where it has been of such a character as is calculated to impose upon creditors and subsequent purchasers. Some of these cases are noticed by the eminent judge who delivered the opinion of the court in *Taylor v. Pope*, 5 Cold., 416. They are usually cases in which possession is connected with an apparent power to sell superinduced by the acts of the owner, or by coupling the possession with the usual *indicia* of title with authority to convey, as in the case of certificates of stock with a power of attorney to transfer on the books of the corporation endorsed thereon: *Cherry v. Frost*, 7 Lea, 1. It is insisted that the facts in this case bring it within the exceptional class.

This position rests upon the ground that the agreed statement of facts shows that the piano was kept by the original vendee in a sewing machine store for sale,

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where he also kept other pianos, and that the plaintiff permitted him to bring it from Boston to Memphis, presumably for the purpose of sale. This court has held that a trust assignment or mortgage of goods, duly proved and registered, intended to secure particular debts, but leaving the possession of the goods with the assignor to sell in the usual course of trade, and replenish the stock, will be invalid as tending to hinder and delay creditors: *Tennessee National Bank v. Ebbert*, 9 Heis., 153; *Nailer v. Young*, 7 Lea, 735. See also *Phelps v. Murray*, 2 Tenn. Ch., 746. And even where such assignments are held valid as between the parties, a purchaser under the power of sale would of course obtain a good title: *Mitchell v. Winslow*, 2 Story, 630; *Brett v. Carter*, 3 C. L. J., 286. A conditional sale, with like powers to sell, would be subject to the same rule: *Lewis v. McCabe*, 21 Am. Law Reg., 217, and cases cited in note. This court, in analogy to its holding in regard to trust assignments as above, would probably treat a conditional sale of chattels with power in the purchaser to sell as tending to hinder and delay creditors, or contrary to public policy and void.

The contract for the conditional sale of the piano in this case not only does not confer upon the purchaser the power of sale, but fairly implies a prohibition to sell. And there is nothing in the agreed statement of facts to show that the contract was other than what it purports to be on its face. The question, therefore, comes to this, does the fact that the purchaser offered the piano for sale in a sewing ma-

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chine store where he had other pianos, and actually sold it without the knowledge of the vendor, carry the title, and deprive the vendor of his property? If the proof had shown that the purchaser was a regular dealer in pianos, that the plaintiffs knew the fact, and sold him the piano as such dealer, there might be strong ground for holding the plaintiffs to the consequences of such a transaction. But in the absence of such proof, the facts are not sufficient to sustain an affirmative answer to the question.

The sale by the plaintiffs to Cooper was on the 25th of September, 1875, and by Cooper to the defendant on October 3, 1875. The present action was commenced on the 14th of May, 1879. The defendant had been in the actual adverse possession of the piano for more than three years, claiming it as her own before the plaintiffs brought their suit, or made their demand. The limitation of actions for the recovery of personal property has always been in this State, and is now three years: Code, sec. 2773. And it has long been settled that the possession of personal property for the length of time required to bar the action of the owner for its recovery vests the title in the possessor: *Taylor v. Miles*, M. & Y., 426. The question is, therefore, made in this case that the defendant is protected by the statute.

The action is not in trover, but in contract waiving the tort. It is well settled that a conversion of property will warrant an implication of indebtedness, and that the tort may be waived, and an action *ex contractu* maintained for its value: *Ott v. Whitworth*, 8

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Hum., 494; *Alsbrook v. Hathaway*, 3 Sneed, 454; *Kirkman v. Phillips*, 7 Heis., 222; *Million v. Medaris*, 6 Baxt., 132. In the first of these cases, which was decided before the adoption of the Code, the action was *indebitatus assumpsit*, waiving the tort, for the value of the article converted, and the limitation was three years. More than three years had elapsed from the conversion, and the effort was to show a new promise, which failed. In the second case, the action was in debt, and it was held that debt would lie for the value of chattels converted, "let the consequences as to the statute of limitations be what they may." No dates are given, and it does not appear whether more than three years from the conversion had passed or not, but, perhaps, it may be fairly implied that they had. The cause of action in the third case originated after the adoption of the Code, and the proceeding was by bill to recover the value of chattels tortiously taken. The taking occurred in 1863 or 1864, and the bill was filed more than three years after the 1st of January, 1867, when the suspended statutes of limitations went once more into operation. The opinion concedes that under the Code, sec. 2773, if the owner of the property had elected to sue for it, or for damages for its conversion, the action would have been barred in three years. But it was held that if he elects to sue for the value of the property, the limitation would be six years under the Code, sec. 2775. "It is true," says Nicholson, C. J., in the opinion, "that a wrong-doer may obtain a title to the property by three years adverse possession, and yet be liable for

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three years after his title is perfected, to pay the original owner the value thereof. This is a necessary consequence of the right which the original owner has to elect whether he will sue for the property or its value. During six years, his right to sue for the value is as perfect as his right to sue for the property within three years."

In the last of the cases above cited, the opinion, delivered also by Nicholson, C. J., states that the action was commenced "to recover the value" of three horses converted by the defendants. The plea was the statute of limitations of three years, and the plaintiff replied that he commenced his action within three years next after he discovered the conversion. The court held that a demurrer to the replication was well taken. The parties and the court treated the limitation as prescribed by the Code, sec. 2773, which is three years "for the detention or conversion of personal property." The limitation is six years in "actions on contracts not otherwise provided for" by the Code, sec. 2775. It is probable that the action was for the detention or conversion of the property, not in contract for its value as inadvertently stated in the opinion. And it is very clear from the report of the case that the distinction taken in the previous cases was not discussed, nor intended to be changed. The conclusion reached in those cases seems to be the logical result of allowing the injured party to elect to sue upon the implied contract. The title to the property becomes absolute in the possessor, as it would do in the case of an unconditional sale, while its value, like the pur-

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chase money, becomes a debt subject to the limitation applicable to contracts.

There is no error in the judgment, and it must be affirmed.

DISSENTING OPINION.

TURNER, J., delivered the following dissenting opinion.

On the 25th of September, 1875, C. S. Cooper bought of Guild, Church & Co., a piano at the price of \$325.00; \$27.12 being paid, the balance evidenced by Cooper's eleven monthly notes, each for \$27.08. By the written contract of sale, it is stipulated, the piano is to remain the property of Guild, Church & Co., until all the payments are made. If the payments are not made, G. C. & Co., have the right to, and may take it back, and for that purpose may enter any building occupied or used in any way by Cooper, without liability for damages or trespass, and without legal process. And so if Cooper removes the piano from the house, or sell, or mortgage, or convey it, without their written consent.

The piano was bought in Boston and removed by Cooper to Memphis. On the 30th of October, 1875, Mrs. McCombs bought the piano from Cooper and paid him \$500.00. The contract with Guild, Church & Co., is signed by Cooper alone, and is the basis of this suit, which was commenced against Mrs. McCombs on the 14th of May, 1879. The agreed facts show that Mrs. McCombs believed the piano was the prop-

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erty of Cooper, and bought and paid for it under such belief. The contract was not registered, and Mrs. McCombs knew nothing of its existence. Guild, Church & Co., made no demand for the piano until March, 1879. The agreement of facts recites: "This piano was kept in a sewing machine store by Cooper, for sale, where persons desirous of purchasing pianos, examined and tried it, he also kept other pianos there." The case was tried by the court without a jury. He gave judgment for defendants in error. It is insisted that under the rule in Tennessee, this was a conditional sale with the title retained until all the purchase money was paid, therefore, the judgment must be affirmed.

The cases upon this subject have arisen in instances where persons have purchased personal property for their individual and private use. No case has been produced extending the rule to embrace sales and purchases between merchant and merchant, in the course of their commercial business. The article in this instance was bought not for the private or family use of Cooper, but to be put upon the market for resale for the sake of the profit of such sale, and in the line of Cooper's business. If the rule shall be construed to include such sales, the result will be to cripple trade. For instance, a merchant in Memphis goes to Boston, New York and Philadelphia, buys boots and shoes of one merchant, groceries of another, domestics of another, silks of another, hats of another, and so on to the completion of purchases of an entire stock, and with each of the dealers from whom

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he buys he has a contract similar to the one before us. When his stocks are opened, each man, woman and child who purchases from him is liable to be made to pay the second time for the hat, boots, shoes, coffee, sugar, calico, etc., they may have bought, because of the secret unregistered contract which is in the possession of the Boston, New York or Philadelphia merchants, and the rule may go back and secure the manufacturer or producer, however remote from the retail dealer.

That this was a sale to Cooper as a merchant, I have not the slightest doubt, from the facts. It was kept on sale in a store where Cooper kept other pianos. Cooper being a dealer in such things, we may legitimately conclude he made the fact known at the time of his purchase, that he might get the benefit of the usual reduction to the trade. The long delay to make any claim of Mrs. McCombs, materially strengthens the presumption. If it had been a sale for private use, the statement as to the keeping in a store for sale would have been qualified to that effect. The defendants in error admitting that it was so kept without more, thereby in substance agree that it was sold to Cooper to put on sale. As they give no date of their acquisition of such knowledge, we must presume they knew from the beginning. They voluntarily trusted Cooper and enabled him to impose upon Mrs. McCombs, their conduct has brought about the loss and they should bear it.

The cases allowing the validity of secret conditional sales have gone to the utmost permissible extent, to

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say the least. Their comprehension should be contracted rather than enlarged. Their origin was of a desire to meet hard cases.

MARY E. METTE v. HARLOW DOW.

DAMAGES. *On covenant of warranty. Vendee and remote vendor.* A sold an undivided moiety of a lot to B, his co-tenant, for \$4500, making him a deed with covenant of general warranty; some years afterwards B sold to C the entire lot for \$3000, making a deed with like covenant; subsequently C was evicted by paramount title, which, being a trust assignment to secure a debt, did not require an account of *mine* profits, and C sued A on his covenant of warranty. *Held*, that he could only recover one-half of the consideration paid by him to his immediate vendor, with interest from the date of eviction.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

JARNAGIN & FRAYSER for Mette.

W. M. RANDOLPH for Dow.

COOPER, J., delivered the opinion of the court.

In this agreed case the Circuit Court rendered judgment in favor of Dow against Mette, and the latter appealed.

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On November 17, 1859, Anthony Street conveyed a lot in Memphis to M. J. Wicks in trust to secure two promissory notes described. On May 22, 1862, M. J. Wicks reconveyed the lot by quit-claim deed to Street, although the secured notes had not been paid. On May 28, 1862, Street sold and conveyed the lot to H. H. Potter and H. H. Mette, for the consideration of \$11,000 paid, with covenants of seizin, against encumbrance, and of general warranty. On November 25, 1865, Mette, in consideration of \$4,500, sold and conveyed his undivided half interest in the land to Potter by deed with like covenants. On October 6, 1868, Harlow Dow filed a bill in chancery against H. H. Potter to recover a debt evidenced by note for \$1169.25, and attached the lot upon the ground that Potter had fraudulently disposed, or was about fraudulently to dispose of his property. On March 2, 1869, Potter conveyed the lots to J. M. Portis in trust to secure an alleged debt of \$6000 due to Portis. On July 30, 1870, Dow filed an amended bill against Potter and Portis, attacking the trust conveyance from Potter to Portis as fraudulent. On May 15, 1871, the original bill of Dow was dismissed, and the attachment sued out thereon quashed, upon the plea in abatement of Potter, the decree providing that the dismissal should not affect the amended bill, which was retained for further proceedings. On the 23d of August, 1871, Potter was adjudged a bankrupt, the lot being included in the schedule of his effects, and, on April 3, 1872, obtained his discharge in bankruptcy. On October 4, 1871, Dow suggested in his chancery

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suit the proceedings in bankruptcy, and amended his bill so as to make the assignee, John Wassell, a party defendant. In February, 1873, Portis and wife reconveyed the property to Potter. On June 21, 1874, Wassell, as assignee, appeared in Dow's suit, and answered his bill, consenting that the suit might proceed to judgment upon condition that he be held free from costs, and that any surplus arising from the sale of the lot over Dow's debt be paid to him. He had previously, on April 2, 1872, sold the lot at a regular bankrupt sale to Potter for \$1.50, and made him a deed. On the 14th of January, 1875, a decree was rendered in the case of Dow against Potter and Portis, setting aside the deed to Portis as fraudulent, fixing the amount of Dow's debt against Potter at \$1596.08, declaring it a lien on the lot, and ordering the land to be sold in satisfaction thereof unless paid in a given time. On May 7, 1875, an agreement was entered into between Dow and Potter, by which Potter agreed to acquiesce in the decree, and Dow agreed to pay \$3008.08 for the lot, and, on the same day, Potter conveyed the lot to Dow for that consideration. On the next day, the lot was sold under the decree and Dow became the purchaser at \$1610. The master reported the sale, and added that Dow's decree being for more than his bid after deducting costs and back taxes, Dow proposed to pay the costs and taxes and credit his decree with the residue. The report was confirmed, and title divested out of Potter and Wassell, his assignee, and vested in Dow. The residue of the purchase price as agreed upon by the parties, after de-

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ducting the costs, taxes and the recovery, was paid by Dow to Potter. No question arises upon the probate or registration of any of the foregoing instruments. Dow went into possession of the lot at once under his purchase, and continued to hold until evicted as hereinafter mentioned.

On January 31, 1871, one Selby, as the holder of the notes secured by the deed of trust of Street to Wicks of the 17th of November, 1859, filed his bill to subject the lot to the satisfaction of his debt, and such proceedings were had in the cause that a decree was rendered in his favor for the amount due, the land sold in satisfaction thereof, and Dow evicted from the lot on July 10, 1877. The lot was worth at that time \$3000. Potter and Mette had joint possession of the lot after their purchase from Street until Mette sold to Potter; then Potter continued in the sole possession until he sold to Dow; and Dow, as we have seen, was thenceforward in possession until evicted under the Selby decree. No rents were claimed by, or allowed to Selby.

Upon these facts, the trial court rendered a judgment in favor of Dow against Mary E. Mette, as the executrix and sole devisee of H. H. Mette, who had died, for \$4500, the consideration for his moiety of the lot in the sale to Potter, with interest from July 10, 1877, the date of eviction. The defendant appealed.

It has been settled in this State, in accord with the current of authority, that the measure of damages for the breach of the covenant of general warranty of

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title in a conveyance of land, where there has been no fraud on the part of the seller, is the original consideration, when it can be ascertained, or the value of the land at the date of the sale, with interest: *May v. Wright*, 1 Tenn., 385; *Talbot v. Bedford*, Cooke, 447; *Elliott v. Thompson*, 4 Hum., 99; *Shaw v. Wilkins*, 8 Hum., 647. And, as the covenant runs with the land, any subsequent vendee who is evicted, may sue for the breach: *Hopkins v. Lane*, 9 Yer., 79; *Kenney v. Norton*, 10 Heis., 384. But where the cases speak of the measure of damages being the consideration money or the value of the land, they mean, says Mr. Rawle, that this is the extent to which damages can be recovered upon the covenant under any circumstances: Rawle on Cov., p., 331, 3d ed. Within this limit, there are rules which diminish the recovery to a lower sum. Interest, for example, is allowed to counter-balance the *mesne* profits which the owner of the paramount title may recover. If, therefore, the statute of limitations prevent a recovery of *mesne* profits for more than a certain number of years, interest will not be allowed for any longer time: *Caulkins v. Harris*, 9 Johns., 324; *Cox v. Henry*, 32 Penn. St., 19. So, if the recovery of *mesne* profits is limited by the date of the accrual of the paramount title, as where it is held under a patent from the State: *Kyle v. Fauntleroy*, 9 B. Men., 620. So, where the eviction is *pro tanto* by the payment of a judgment which is an incumbrance: *Kenney v. Norton*, 10 Heis., 388; *Austin v. McKinney*, 5 Lea, 488. So, where there is no recovery of *mesne* profits for a cer-

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tain period by reason of a life estate in the vendor: *Crittenden v. Posey*, 1 Head, 312. So, as in the case before us, upon the same principle, where by reason of the character of the paramount title, the *mesne* profits are not needed, or not allowed to the claimant. The trial judge did not err, therefore, in refusing to allow interest on the recovery except from the date of the plaintiff's eviction.

The consideration of Mette's sale to Potter for his moiety of the land was \$4500. The consideration of Potter's sale of the whole lot to Dow was only \$3008.08 at the utmost. And the first question which arises on this state of facts is, whether Dow is entitled to recover from Mette's estate the whole of the original consideration of the conveyance from Mette to Potter, or only the one-half of the consideration paid by Dow to Potter for the entire lot? If the trial judge was correct in giving the former sum, it is clear that Dow will be largely more than re-imbursed for his own outlay for the property, and will recover more than he would be entitled to in a direct action against his immediate vendor upon the covenant of warranty in his deed. The result is somewhat startling, and should be sustained, both by reason and authority, to commend itself to our sense of justice.

The argument submitted in its favor is that the covenant sued on admits of the measure of damages claimed, if sued upon by the original grantee, and that the plaintiff, as assignee of the covenant, must necessarily be entitled to the same recovery. The measure of damages, as between the original parties, is un-

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doubtedly the consideration, with interest. But, as we have seen, this is the full extent to which damages can be recovered under any circumstances. It does not follow that the full measure of damages shall be recovered in every case. On the contrary, as we have also seen, the damages may be cut down so far as the interest is concerned, whenever, upon the principle that interest is in lieu of *mesne* profits, the plaintiff has not been compelled to account for *mesne* profits. Strictly, the plaintiff is entitled, as held by the supreme court of Massachusetts, to recover the whole amount, subject to a deduction of the *mesne* profits received by him for which he was not held to account to the paramount owner: *Whiting v. Dewey*, 15 Pick., 428. Inasmuch, however, as the law, by a presumption which is not allowed to be disputed, treats the profits as equivalent to the interest, the limitation of the recovery of interest to the period for which the *mesne* profits are rendered, reaches precisely the same result: *Rawle on Cov.*, 93, 3d ed.; *Guthrie v. Pagsley*, 12 Johns., 126; *Spring v. Chase*, 22 Maine, 502; *Patterson v. Stewart*, 6 W. & S., 528; *Rich v. Johnson*, 1 Chand., 20.

If, now, the measure of damages may be cut down by a deduction of the interest when necessary to attain the ends of justice, no reason occurs why a deduction of the principal may not also be made in a proper case. The covenant is a peculiar one, and not like an ordinary covenant for so much money. It is rather in the nature of a bond with a fixed sum as a penalty, the recovery on which will be satisfied by

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the payment of the actual damages. Each vendor, subject to this rule, may be treated as the principal obligor to his immediate vendee, and as the surety of any subsequent vendee to hold him harmless by reason of the failure of title, and the ultimate vendee, when evicted, is entitled to be subrogated to the rights of his immediate vendor against a remote vendor to the extent necessary to indemnify him. Such a vendee, to use the language of the supreme court of North Carolina, sues a remote vendor on the covenant to redress his, the plaintiff's, own injuries, not the injuries of the immediate vendee of such remote vendor. Accordingly, that court held, in a case like the one before us, that the measure of damages was the consideration paid by the plaintiff to his immediate vendor with interest, and not the consideration paid by such vendor to the defendant. In other words, the damages recovered were limited to the actual injury sustained: *Williams v. Beeman*, 4 Dev., 483.

The industry of counsel has found some *dicta* in cases not involving the question, but no direct authority in conflict with this decision. The case of *Lawrence v. Robertson*, 10 Rich., turns upon the wording of a statute. In *Hopkins v. Lane*, 9 Yer., 79, the facts, as given by the Reporter, show a sale and conveyance of land by Hopkins to Cox for \$2328, and a sale and conveyance of the land on the same day to the plaintiff Lane for \$1700. The recovery is stated to have been for the former sum with interest. It does not appear why there was such a difference in the consideration of the two conveyances executed

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on the same day, and it is certain that no argument was submitted, nor ruling made by the court on the point thereby raised, and now under consideration. On the other hand, in the recent case of *Aiken v. Suttle*, 4 Lea, 103, 133, the principle settled tends to sustain the North Carolina decision. There, a married woman had filed a bill to recover land which had been sold under a power of attorney executed by her in connection with her husband, and subsequently resold several times. The sale was held to be void as to the married woman, and her right to the land declared, to be enjoyed in possession at the death of her husband. But it was also held that she should account to the then holder of the land for the purchase money received and appropriated by her, with interest, to the extent necessary to re-imburse such holder the purchase money paid by him to his immediate vendor, with interest from the death of the husband. This, it was said, is, in legal contemplation, indemnity for the loss of the land, since it is all he, the holder, could recover from his vendor if he had a warranty of title. "This limitation," it was added, "may seem to operate somewhat arbitrarily, and it may sometimes permit the reclaimant to retain some of the consideration received for the land reclaimed, but, upon the whole, it appears to be equitable, and it is based upon an obvious analogy." The analogy referred to was, in the view of the learned special judge who delivered the opinion of the court, precisely that of a recovery upon a warranty of title to land, citing *Elliott v. Thompson*, 4 Hum., 99, but without having in his mind the state

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of facts now before us. It is only the principle announced, therefore, and not the *dictum* in the illustration which can aid us in the present case. The principle is in point.

The great difficulty in regulating the damages on the covenant of warranty of title, was in finding some measure which would indemnify the purchaser without bearing too heavily on the vendor. In this country, where lands, as a rule, were enhancing in value and being rapidly improved, it was found, that to give the value of the land at the time of eviction, the only mode of securing full indemnity, would be ruinous to the vendor, and often make him liable for an amount which the parties could not have contemplated at the time of the contract. The measure of damages adopted, it was thought, would more nearly meet the difficulties of the subject than any other. Indemnity was, however, all that any vendee could reasonably ask, and if this could be obtained by a recovery within the limit of the measure adopted, it is clear that the ends of justice would be met. The recovery in this case, should, therefore, be cut down to the one-half of the purchase money paid by the plaintiff for the lot, with interest.

The learned counsel of the appellee insists that the recovery should be cut down still further, his argument being based upon the title acquired by the appellee, according to his view of the facts, and the effect of the proceedings in bankruptcy. But the lien of the appellee was prior and superior to that of the assignee in bankruptcy. For, although his original bill was discussed, the so-called amended bill, which

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was in reality a supplemental bill based upon the new fact of the fraudulent conveyance by Potter to Portis, was retained, and the lien thereby acquired also antedated the proceedings in bankruptcy. No attachment was necessary: Code, sec. 4288; *August v. Seeskind*, 6 Cold., 166, 172. Besides, the conveyance to Portis was good as between the parties, and the title thus acquired has never been sought to be set aside by the assignee. His re-conveyance to Potter after his discharge in bankruptcy, again clothed the latter with the original title, and his conveyance to Dow would carry the covenant of warranty.

The agreed facts do not show that the profit on city script in which the taxes were paid, diminished the consideration actually paid for the land by Dow. And the fact that the U. S. currency, in which Potter paid Mette the price of his moiety of the land, was worth at the time only fifty cents in gold, if it ever could have cut any figure in the case, has ceased to be of importance by reason of the conclusion reached as to the measures of recovery.

The judgment below will be reversed, and a judgment rendered here in accordance with this opinion.

Stewart, Gwynne & Co. v. Insurance Co.

STEWART, GWYNNE & Co. v. THE PHOENIX INSURANCE
COMPANY.

1. WAREHOUSE RECEIPTS. *Assignment. Estoppel.* Warehouse receipts are considered representatives of property, and an assignment of the receipt is equivalent to a delivery of the property, and the warehouseman is estopped, as against the assignee, to deny that he had the articles mentioned in the receipt.
- 2 SAME. *Contracts. Evidence.* These receipts are generally contracts, and cannot, like ordinary receipts, be varied, explained or contradicted by parol proof.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

MYERS & SNEED for Stewart, Gwynne & Co.

U. W. MILLER for Insurance Company.

McFARLAND, J., delivered the opinion of the court.

The plaintiffs, The Phoenix Insurance Company of Memphis, agreed to loan A. J. Vaughn & Co., also of Memphis, \$1500, but required security. Stewart, Gwynne & Co., the defendants, of the same city, were warehouse-men, and had in store cotton belonging to A. J. Vaughn & Co.

The proof indicates that a conference was had between the secretary of the Insurance Company and a

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member of each of said firms, in which it was understood that the Company was to be secured in its loan to A. J. Vaughn & Co., by a warehouse receipt of the defendants, Stewart, Gwynne & Co., for cotton. Accordingly, on the 14th of June, 1878, the loan was consummated. A. J. Vaughn & Co., executed their note of that date to the plaintiffs for \$1500, due at ninety days. At the same time A. J. Vaughn & Co., delivered to the plaintiffs the following warehouse receipt:

MEMPHIS, June 14, 1878.

Received of A. J. Vaughn & Co., at the warehouse of Stewart, Gwynne & Co., in good order, the following cotton: .

Marks.	No. Bales.	Consignee.
Various.	40.	Forty b.c.

Guaranteed valuation, fifteen hundred dollars, deliverable only on return of this receipt endorsed by the secretary of the Phoenix Insurance Company.

(Signed.)

STEWART, GWYNNE & Co.

At the maturity of the note, a yellow fever epidemic was prevailing in the city of Memphis, of which the secretary of the Insurance Company died, and business was suspended. The note was, on the 18th of November, 1878, renewed, at that time, Gwynne, a member of the firm of Stewart, Gwynne & Co., (who was also director of the Insurance Company), offered to deposit a new warehouse receipt, but the offer was declined, the Company preferring to retain the old receipt, which is specifically set out as a collateral in the renewal note.

Before the maturity of the new note, to-wit, some time in December, 1878, Gwynne called on the secretary of the Company and told him that A. J. Vaughn

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& Co., had failed, and that the cotton then in the warehouse of said firm (S. G. & Co.,) on account of A. J. Vaughn & Co., was being replevied by the producers, and requested that plaintiffs take forty bales of the cotton to secure itself, or to defend the replevin suit.

The secretary of the Company then enquiring of Gwynne if the cotton then in his warehouse was the same cotton they had on hand when the receipt of the 14th of June was given, and he replied that it was not, or that he did not know that they had any of the same cotton on hand. The secretary then informed Gwynne that the Company would have nothing to do with any other cotton, or the defense of the replevin suit.

At the maturity of the renewal note the secretary of the Company called on defendants for the cotton specified in the receipt or its guaranteed value, and offered to endorse and deliver up the receipt according to its terms. The defendants replied they did not have the cotton, and declined to pay its value.

Gwynne testified that at the date of the warehouse receipt, 14th of June, 1878, his firm had in their warehouse about 115 bales of cotton for A. J. Vaughn & Co., nearly all of which was on hand at the maturity of the first note, but admits, substantially, that they had none of this cotton on hand at the time he called on plaintiffs to take away forty bales. He says further, that more than forty bales were replevied from his firm by the producers. It is not very clear, from his testimony, whether at the time the cotton was

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finally demanded, there was any of the cotton of A. J. Vaughn & Co., on hand. He does not say that at that time he tendered or offered to deliver any cotton. The demand, however, was for the cotton specified in the receipt; the reply was, they did not have it.

The cause was tried without a jury, and judgment rendered for the plaintiffs for \$1500, the guaranteed value of the cotton. The principal assignment of error relied upon, is the action of the judge in rejecting certain testimony offered by the defendants; that is to say, they offered to prove that it was agreed between all parties, plaintiffs, A. J. Vaughn & Co., and defendants, at the time of giving the warehouse receipt, that defendants could hold said forty bales of cotton, then at their warehouse, or any other forty bales that might afterwards come in; so they retained on hand as much as forty bales worth \$1500, and this, for the purpose of giving to A. J. Vaughn & Co., the privilege of continuing to sell their cotton. That this was the reason the cotton was not more particularly described in the receipt. The proposition was stated in various forms to the court, but upon objection, the proposed testimony was excluded.

The action of the judge was based upon the familiar rule that parol evidence of previous, or contemporaneous conversations between the parties, is not admissible, to vary the terms of a written contract. The question is whether the proposed testimony was admissible under any of the various exceptions to this general rule.

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First. It is insisted that the rule does not apply to *receipts* which are always open to explanation. Such is the general rule as to receipts: See *Jones v. Ward*, 10 Yer., 160. The reason, probably, is that in general, a receipt is not a contract; it is usually but the evidence of a fact, as for instance, the payment of money—the delivery of property—the settlement of accounts, etc., in all which cases the receipt may be explained and the fact shown to be otherwise.

But a paper may be in the form of a receipt and yet be in substance a contract, that is, it may contain an agreement to do, or not to do some particular thing in the future. If in substance a contract, the same rule should apply that applies to other contracts.

We need not enquire what would be the rule as to a warehouse receipt between the original parties. That is to say, in this case between the defendants and A. J. Vaughn & Co. It may be conceded, that as between them, the receipts might be explained or contradicted, so as to show that no such cotton had been delivered or received; at least this may be conceded for the argument. In view, however, of the importance attaching to papers of this character, and the great extent to which they are used as collaterals in commercial transactions, a different rule, at least, has been applied, where they came to the hands of innocent parties.

By custom such receipts have come to be considered as representatives of the property, and an assignment equivalent to a delivery of the property to the assignee, and the warehouse-man is estopped as against

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the assignee who has purchased in good faith to deny that he had the articles mentioned in the receipt: See Justice Miller's decision in *McNeil v. Hill*, 1 Woodworth's Ch. C. & Rep., 96.; also 19 Am. L. R. N. S., 566; also the general principles settled in the case of *Gibson v. Steney*, 8 Howard U. S., 384. So that as against an assignee who has purchased, or to whom it has been assigned in good faith for advances made, the warehouse-man cannot be permitted, by parol, to show that he had not the articles mentioned in the receipt at the time it was given. The stipulation upon the face of the receipt that the articles mentioned will be delivered only upon the return of the receipt, is a *contract* upon which the assignee has a right to rely, upon the faith of which he has acted and for the breach of which he has his action against the warehouse-man. It is, therefore, as between the makers of the receipt and an assignee who has, in good faith, taken it as security for money advanced, not simply a receipt subject to be explained and contradicted by parol proof, but a *contract*, and subject to the rules applicable to other contracts. This is not upon the ground that they are negotiable strictly, but they are *sui generis* and stand upon grounds applicable to that class of paper.

The plaintiffs in this case stand in the attitude of an assignee of the receipt in good faith, for money then advanced, without notice of any infirmity. Although upon its face the receipt shows that the cotton was to be delivered upon the return of the receipt endorsed by the secretary of the Insurance Company, and although

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there is proof that the giving of the receipt was agreed upon by all the parties previously, yet the actual transaction in regard to delivering and storing of the cotton, was alone between the defendants and A. J. Vaughn & Co., with which the plaintiffs had nothing to do, or so far as appears, any knowledge. It is the same, therefore, as if the receipt had stipulated for the delivery of the cotton to A. J. Vaughn & Co., and they had assigned it to the plaintiff. Upon this ground, therefore, the testimony was not admissible.

Second. It is insisted that conceding the writing to be a *contract*, yet there was a latent ambiguity arising from the proof, which, according to the familiar rule, may be removed by parol testimony. That is to say, it appears that at the time the receipt was given, the defendants had on hand 115 bales of cotton belonging to A. J. Vaughn & Co., and the receipt does not designate or distinguish any particular forty bales out of the 115 bales, and therefore parol proof must be admitted to designate the cotton actually embraced in the receipt. The transfer of the warehouse receipt had the effect of an actual delivery of the cotton to the assignee, to be held as a pledge, and therefore the identical cotton should be designated, and it appearing that defendants had a large number of bales on hand, and the receipt not distinguishing the forty mentioned from the others, parol proof would have been admissible for this purpose, that is, to designate the bales actually embraced in the receipt. But it does not follow that parol proof is therefore admissible for all purposes. In other words, the ambiguity or uncer-

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tainty arising upon the proof as to the identical bales embraced in the receipt, may be met or removed by parol testimony, but this does not open the door for the admission of parol proof generally, or for any other purpose. We need not enquire in this case whether the parol proof would have been sufficient to designate the particular cotton; it is probable the defendants would, in any event, have been liable for the value. They, as we have seen, would have been estopped as against an assignee of the receipts to deny that they had the cotton, and their inability to show that any particular bales were agreed upon to be included in the receipt, would probably be no defense for them.

Again, it is insisted that the proposed testimony should have been heard because it amounted to proof of an independant collateral agreement. The case of *Leinau v. Smart*, 11 Hum., 308, may be given as an illustration of this rule. There was in that case a sale and conveyance of a "tavern house" and lot, and at the same time an independant collateral parol agreement that the vendor would close up another tavern he owned in the same town. The action was for a breach of this latter contract, and the recovery was held proper. Proof of this collateral agreement, it was held, in no sense varied or contradicted the written contract.

And so also where the writing embraces only part of the contract, as where there was a written contract for the hire of a horse for six weeks at two guineas, parol proof was admitted that the hirer was responsi-

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ble for all accidents. So in the case of *Cobb v. Wallace*, 5 Cold., 539, there was in the first instance a parol contract for the purchase of a load of coal, and for hiring a barge to transport the coal from Haws-ville, Kentucky, to Nashville, the barge to be returned as soon as the coal was unloaded. Afterwards, on delivery, there was a written receipt which specified the quantity and price of the coal, and also the hiring of the barge "at three dollars a day until the barge is returned." The suit was for the failing to return the barge, and the question was when it should have been returned. It was held, in substance, that proof of the previous parol contract was admissible, and it was for the jury to say whether the writing was intended to embrace all that it was finally agreed upon. It will be observed that under these authorities, parol proof may be heard as to an independent collateral agreement, or where there has been a parol agreement and a part only reduced to writing, the whole contract may be proven, *but in neither case is the writing to be contradicted.*

Ellis v. Hamilton, 4 Sneed, 512, was an action upon a note or bill for the payment of a given sum on a particular day. The defense of the surety was, that at the time the note was given there was a further agreement, in substance, that the payee of the note was to receive payments in a different mode, and that the obligation of the surety was not absolute. The defense was held inadmissible, as this was to contradict the written contract.

We have only to apply these principles to the pres-

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ent case. We have seen that the warehouse receipt in the hands of the plaintiffs was a written contract, by which the defendants agreed that they held forty bales of cotton delivered to them by A. J. Vaughn & Co., which they promised to hold for the plaintiffs, and deliver to it upon the return of the receipt endorsed by its secretary. The transfer of this contract vested the right of this particular forty bales of cotton in the plaintiffs, to be held as a pledge for the security for their debt. The parol testimony offered was to show, that at the time the receipt was given, the contract was not that any particular forty bales of cotton were to be held, but that defendants were to keep on hand as much as forty bales of cotton worth \$1500, belonging to A. J. Vaughn & Co., subject to this receipt. That they were at liberty, at any time, to exchange the cotton for any other forty bales of equal value. We think the evidence was properly rejected. It was certainly not an independent collateral agreement; there was but the one contract, either the one specified in the receipt or the parol contract which the defendants offered to prove. Both contracts cannot stand. They are different in their terms and in their practical results, and one must give way to the other.

Nor is it a case where only part of the contract was reduced to writing. As we have seen in such cases, there is to be no conflict between the parol contract and the writing. They stand together, and are consistent. The only difference is, the writing does not embrace it all. In our opinion, the parol proof in

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this case contradicts the writing, and is therefore not admissible. It is not easy to see the necessity or advantage to the parties at the time of varying the terms of the receipt, as it is insisted was done. It is admitted that defendants were, at all times, to keep on hand as much as forty bales of cotton, worth \$1500. They might as well keep the original forty bales as any other. We see no reason, at that time, to make such stipulation.

The practical difference is, that if defendants are allowed to change the contract according to the parol proof offered by them, they claim that the cotton last on hand was taken by a superior title to A. J. Vaughn & Co., and as warehousemen are not warrantors of the title, they are excused.

It is finally insisted, that the obligation of the defendants was in the nature of a guaranty, and that they were entitled to notice, but we think it clear that no notice was necessary.

Upon the whole, we think there is no error in the record, and the judgment will be affirmed.

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J. M. WALLACE v. J. E. GREENLAW, Ex'r, et al.

SUBROGATION. *Endorsers.* T and G were first and second endorsers for W. Judgment was recovered against G. T furnished G \$7,000, to aid in paying the judgment. G paid the balance. Prior to the judgment the debtor by deed of trust conveyed property to G to secure him as said endorser and to secure other indebtedness to G. *Held*, that T was not entitled to share in proceeds of trust property until the indebtedness of W to G had been satisfied in full. The doctrine of subrogation in favor of creditor or co-security does not apply. The first endorser was liable for full amount of the judgment, and was not entitled upon the sum he had paid to share *pro rata* in the trust property with G, but only entitled to whatever sum might remain after payment in full of the indebtedness of W to G.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. McDOWELL, Ch.

CRAFT & COOPER and CLAPP & BEARD for complainants.

R. J. MORGAN, W. MESSICK, HARRIS & TURLEY, JARNIGAN & FRAYSER and HUMES & POSTON for defendants.

McFARLAND, J., delivered the opinion of the court.

The controversy brought up by this appeal has arisen between W. A. Williamson and W. C. McClure, receiver of the Bank of Memphis, both claiming rights

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growing out of the administration of the estate of W. B. Greenlaw, deceased, which was being administered in this case as an insolvent estate. The parties have chosen, without objection, to treat the matters in dispute as properly presented for adjudication by the petitions and answers filed by them as creditors of said estate, and we therefore make no question as to the propriety of this mode of proceeding. The facts upon which the questions arise are as follows:

W. B. Waldran was indebted to Wade H. Bolton by note for a balance of some \$17,500, which had been endorsed by Sam. Tate and W. B. Greenlaw for the accommodation of Waldran—Tate being first and Greenlaw second endorser. Greenlaw demanded security of Waldran, and on the 8th of April, 1869, the latter conveyed to W. Messick, trustee, property in Memphis, known as the "Waldran Block," first, to secure Greenlaw in another indebtedness of about \$4,169.22, money which he had paid for Waldran on a debt known as the Tharpe note, and next to secure Greenlaw on account of his aforesaid endorsement of the Bolton note, with the usual power of sale and directing how to appropriate the proceeds. The trust deed conveyed other property which, however, by consent of the parties in interest, was afterwards released.

Subsequently, the executor of Bolton sued Greenlaw upon his endorsement of the note referred to, and obtained judgment for the balance due, with interest. Greenlaw being pressed for the payment of this judgment, applied to Tate, the first endorser of the note, for assistance, and received from Tate seven thousand

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dollars, and executed and delivered to him the following paper, to-wit:

“Memphis, Tenn., Dec. 10, 1872.

Received of Sam. Tate seven thousand dollars, to aid me in paying a judgment against me on account of my endorsement of W. B. Waldran's note, first endorsed by said Tate; said judgment is in favor of E. M. Apperson, executor of Wade H. Bolton, for which I hold a deed of trust from Waldran on what is known as the “Waldran Block,” which deed of trust is a first lien on said property. I agree to prosecute said trust deed to collection as soon as possible, and when collected to pay the said Tate, or order, the seven thousand dollars now advanced me, with interest.”

Signed, W. B. Greenlaw.”

Soon thereafter, Greenlaw, with the money thus furnished and with other money of his own, paid said judgment to Apperson, executor, in full.

W. A. Williamson subsequently became the owner, by assignment, of Greenlaw's claims against Waldran (which included other debts besides those mentioned) and to the benefit of the security of said deed of trust in the following manner; Waldran, it seems, had filed a bill against Greenlaw for the purpose of setting up defenses to the debts claimed by Greenlaw, and to enjoin the execution of said deed of trust. The cause was heard in the chancery court and a decree rendered in favor of Greenlaw for some \$18,000, from which Greenlaw appealed. Pending the appeal, in 1874, Greenlaw assigned all his rights in this suit to Williamson to secure a pre-existing indebtedness, and agreed

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to prosecute this appeal for his benefit. Greenlaw died, and the cause was revived in the name of his executor for the use of Williamson, and prosecuted to a decree against Waldran for upwards of \$31,000, the injunction was dissolved, and the trustee directed to proceed under the trust deed to sell the property.

When Tate received from Greenlaw the receipt for the \$7,000 of the 10th of December, 1872, or soon after, he placed it in the hands of M. J. Wicks, to secure him as Tate's endorser of a note to the Bank of Memphis; subsequently, about April, 1878, by agreement, McClure, the receiver of the Bank of Memphis, accepted said receipt in satisfaction of said note. So, it is not denied that McClure is entitled to Tate's rights under said receipt. It is assumed that the property embraced in the deed of trust, the "Waldran Block," will not sell for enough to pay all the indebtedness secured by it, and hence the question arises, upon whom the loss shall fall. It is insisted upon behalf of McClure, that by virtue of the transaction of the 10th of December, 1872, and the paper of that date, Greenlaw became bound to pay Tate \$7,000 and interest out of the proceeds of said property, and this by the force of said transaction and contract gave to Tate a prior right to that extent under the deed of trust, and that McClure, standing in Tate's shoes, is entitled to the same right. Among other positions taken in behalf of Williamson, it is insisted that both he and McClure stand in the attitude of equitable assignees of Greenlaw, and that under the rule in this State, Williamson has first perfected his right by giving

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notice to the trustee, Messick, and the debtor Waldran; and that no such notice was given to the trustee of the assignment of the \$7,000 receipt by Tate; and further, that by superior diligence upon the part of Williamson, and laches upon the part of the claimants of the \$7,000 receipt, the former has acquired the superior equity. Without, however, disposing of these questions, we will treat the case as if it were a contest between Greenlaw and Tate themselves over the proceeds of the trust property, leaving out of view the questions above referred to as to the effect of the assignments. In this view the case turns upon the effect of the transaction of the 10th of December, 1872, between Greenlaw and Tate, and the paper that day executed. Did this give to Tate a prior right of satisfaction out of the proceeds of the trust property to the extent of the \$7,000 and interest?

It may readily be conceded, as argued on behalf of McClure, that the legal effect of the deed of trust made by Waldran was to secure the payment of the *debt to the creditor*, so far as the property conveyed proved sufficient, and that the deed is not to operate merely for the personal benefit of Greenlaw. The creditor would have been entitled to the benefit of the security, and if the proceeds had at his instance been appropriated directly to the debt it would, of course, thereby have enured to the indemnity of all others secondarily bound upon the paper; so that any indemnity obtained by one surety enures to the benefit not only of the creditor, but also of a co-surety, or it may be of any one secondarily liable. And it may

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further be conceded, that where the debt has been paid to the creditor by the sureties, any indemnity held by either surety would enure to the benefit of the others who paid any part of the debt; and further, that where the indemnity proves insufficient to reimburse the sureties the amounts paid by them, they will share the indemnity *pari passu*. That is to say, if Greenlaw and Tate had been *co-sureties* of Waldran, and the proceeds of the property conveyed by the deed of trust proved insufficient to reimburse them in full, then they would share the proceeds *pari passu*, notwithstanding the fact that the deed of trust was made at the instance of Greenlaw, and upon its face purports to be for his benefit: See *Jones v. Hanlet*, 2 Sneed, 256; *Kennedy v. Pitts*, 2 Sneed, 91; 6 Hum., 313.

This must result from the relative rights of the sureties as between themselves, for a surety has the right to compel a co-surety to share the loss with him equally, and to effect this, any indemnity obtained from the principal debtor must be shared equally. To this extent the doctrine of subrogation contended for may be conceded. But it will be borne in mind, that Greenlaw and Tate were not *co-sureties*. Tate being first endorser, was liable to Greenlaw for any sum the latter may have been compelled to pay, unless otherwise indemnified. As between the two, Tate was liable for the whole debt—as to Greenlaw, he stood in the attitude of principal debtor. It is true there is nothing in the pleadings or proof as to whether Tate's liability had been fixed by notice or otherwise; as already said, the pleadings are altogether informal.

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But we think it apparent that Tate's liability was conceded by him, and the transaction of the 10th of December, 1872, was had in reference thereto. Waldran, the principal debtor, in his deposition says, the reason that Greenlaw called on Tate for assistance in paying off the judgment was, because Tate was first endorser; he says Tate was hard pressed for money, and talked freely to witness about it, but witness was in no condition to help. He says Tate did not loan Greenlaw the \$7,000, but on the contrary it was his distinct understanding that it was because Tate was first endorser that Greenlaw demanded his assistance; besides, this fact sufficiently appears from the face of the receipt. So that, assuming that at the date of this transaction, Tate's liability as first endorser upon the note was admitted, and the \$7,000 advanced by Tate in recognition of this liability, then what right did he acquire by the payment to be subrogated or substituted to Greenlaw's rights under the deed of trust? He undoubtedly acquired a right; that is to say, if the property proved sufficient to pay the whole debt, Tate will be reimbursed the amount advanced by him, or he will be entitled to all that remains after paying Greenlaw what he may be entitled to. We think it clear that by the payment Tate did not acquire a right to priority over Greenlaw, or even to share with him the proceeds of the trust property equally.

As we have seen, Tate was first liable for the whole debt; by recognizing his liability and meeting it to the extent of the \$7,000, he did not change the rela-

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tive rights of himself and Greenlaw, or deprive the latter of any rights he previously had, either against Tate or under the deed of trust. It cannot be that Greenlaw's rights were any less after receiving this payment from Tate than before. This is, of course, upon the assumption which we have already made, that Tate advanced the money in recognition of his liability as first endorser. Of course it would have been different if Greenlaw had simply borrowed the money from Tate, or in consideration of the money had assigned him so much of the proceeds of the deed of trust. Our conclusion, therefore, is that by reason of the payment alone, Tate acquired a right to be reimbursed out of the proceeds of the trust property only after Greenlaw was satisfied in full. It does not change this conclusion that Greenlaw has lost by the statute of limitations all right of action against Tate as his prior endorser. This does not relieve Tate of all liability to Greenlaw for any sum the latter or his assignee may fail to realize out of the deed of trust, but to the extent of the \$7,000. Tate having paid it, it becomes simply a question as to his right to be reimbursed. We hold that he cannot recover it from Greenlaw or to his prejudice, unless he can do so by virtue of the express contract of Greenlaw, which is the remaining question to be considered.

It is very earnestly argued, that whatever may have been Tate's rights by virtue alone of the payment of the money, still Greenlaw, by the express terms of his written contract, bound himself absolutely to pay Tate the \$7,000, and interest, out of the proceeds of the

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trust property. We do not deem it necessary to review the authorities referred to, to show that it is perfectly competent for parties occupying the relation of co-sureties or successive endorsers, to fix between themselves their respective rights and liabilities by agreement. The proposition may be conceded, and further, that such agreement may be made after the liability has accrued, and that their rights and liabilities as fixed by the agreement will be enforced by the courts, even though the rights and liabilities thus fixed by their agreement be different from their rights under the law. We need not stop to enquire whether this proposition is subject to limitations or exceptions, but for the argument concede it to the full extent. The question then is, what is the proper construction of the paper of the 10th of December, 1872? Did Greenlaw undertake absolutely to pay to Tate, out of the proceeds of the trust property, \$7,000, and interest, or transfer to him that much as a prior claim? Did he intend to change the relative rights of Tate and himself under the deed?

Greenlaw, by this paper, acknowledges that he had received from Tate \$7,000, to aid him (Greenlaw) in paying the judgment against him on account of his endorsement of the Waldran note, first endorsed by Tate, and promises to prosecute the deed to collection, and out of the proceeds, when collected, pay to Tate, or order, the \$7,000, and interest. But it must be borne in mind that the property was then regarded as worth largely more than all the debts secured by the deed—the “Waldran Block” then being worth, ac-

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according to the proof, \$40,000. So, in making this promise, Greenlaw assumed that there would be no loss to either of them. The contingency of a deficit was not contemplated. Construing this paper in the light of the surrounding circumstances, we hold that it was not intended as an undertaking upon the part of Greenlaw to pay Tate the \$7,000, and interest, as a prior claim out of the proceeds of the trust property, or as a guaranty that the property should pay all the debts. The promise of Greenlaw only meant that he would, out of the proceeds of the trust property, repay Tate according to his legal rights. So we hold, that in case the property fails to sell for a sum sufficient to pay all the debts, Greenlaw or his assignee is entitled to priority, both as to the debt called the Tharpe debt, which is in terms given priority in the deed, and also as to the money advanced by Greenlaw to pay the Bolton debt. McClure, as assignee of Tate, will only be entitled to the surplus. We are unable to see the grounds upon which the doctrine of estoppel can aid McClure. The decree of the chancellor having been otherwise, must be reversed.

It has been argued that a debt of \$2,000, held by Greenlaw's estate against Tate, should be set off against any claim upon the \$7,000 receipt in favor of Tate or his assignee; but as was correctly held by the chancellor, the claim founded upon the \$7,000 receipt is against Waldran and the trust property, and the \$2,000 is due Greenlaw's estate, and these claims are, therefore, not subject to be set off.

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As above indicated, the decree will be reversed, and the costs of this court paid out of the sale of the trust property.

J. C. JOHNSON v. CITY OF MEMPHIS.

PRINCIPAL AND AGENT. *Agent not responsible for damages. When.* One who acts without compensation as a friend or agent for another abroad, and as such friend or agent contracts in the name of his principal for work to be done for the principal, is not responsible in damages for accidents that may result from the manner of doing the work, or a failure to exercise extraordinary care in its execution, the undertakers being men of ordinary care and skill, and so known to the agent.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. C. W. HEISKELL, J.

ESTES & ELLETT for Johnson.

W. M. RANDOLPH for City of Memphis.

TURNER, J., delivered the opinion of the court.

On the 12th of March, 1872, Johnson purchased from Wilson a lot in the city of Memphis, for E. W.

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Lehman of Philadelphia, and paid for it with notes belonging to Lehman. At the time of the purchase, it was intended by Lehman to sell the lot; therefore for the convenience of readily making a deed, the title was taken to Johnson. Lehman concluding not to sell, on the 16th of July, 1873, Johnson conveyed the property to him. The deed was not registered until January, 1874.

Johnson, as the agent of Lehman, made contracts for the erection of buildings, excavations of cellars, etc. upon the property. The contracts were in writing and recited the agency of Johnson. The work of building and excavation was commenced. The excavation extended from one and a half to five feet into a side-walk on Main street.

In November, 1873, Christopher Clark fell into the pit and his leg was broken. In February, 1874, he brought suit against the city, and in March, 1875, recovered a judgment for three thousand dollars and costs. The city brings this suit to recover that amount from Johnson.

The cause was tried by the circuit judge without a jury. Judgment for plaintiff. Defendant appeals.

"When the case was about to be reached for trial, the city attorney called on Johnson for names of witnesses, and found that the property really belonged to some one else. Asked him the names of workmen, and told him the character of the case, and that it was coming on for trial, and that we would attempt to hold him responsible if city lost suit." Witness is

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not positive that this interview was more than two days before the trial.

This statement is sufficient for a decision of the case, and presents the single question, whether one who acts without compensation merely as the friend or agent of another who lives abroad, and as such agent or friend contracts in the name of his principal for work to be done for that principal, is responsible in damages for accidents that may result from the manner of doing the work, or a failure to exercise extraordinary care in its execution, there being no pretense that the undertakers were not, in their several lines of service, men of ordinary care and skill, and so known to the agent, and no pretense that the agent failed to exercise prudence and caution in their employment.

It is clear no responsibility can attach under such circumstances. Judgment reversed, and judgment here for plaintiff in error.

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SANDY MATTHEWS v. THE STATE.

1. CRIMINAL LAW. *Prisoner present at trial. When.* A prisoner in the dock in a position to see and hear all that is done, and has the opportunity to interpose objections, is in law present at the trial, and a new trial will not be granted because two jurors were accepted by his counsel while so confined in the dock.
2. SAME. *Prisoner should not be manacled.* A prisoner should not be manacled or handcuffed during his trial, but if a juror is selected, by his counsel, upon the trial, when by inadvertence he is so handcuffed, it is not error for which a reversal will be had.
3. SAME. *Confessions.* To say to the prisoner that "an honest confession is good for the soul," is not a promise of temporal benefit or discharge from punishment for the crime charged as will render a confession inadmissible.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HERRIGAN, J.

J. T. MOSS for Matthews.

ATTORNEY-GENERAL LEA for the State.

DEADERICK, C. J., delivered the opinion of the court.

Plaintiff in error was convicted in the criminal court of Shelby county, of murder in the first degree and sentenced to be hanged, and has appealed to this court.

If the testimony of Bettie Hicks be true, it was a most atrocious murder. She testifies that deceased

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was sitting near the door of prisoner's house, in friendly conversation with him, when the prisoner struck him with an axe in the head, and repeated the blow after deceased had fallen; that he then dragged him round by the kitchen chimney and severed his head from his body; that several hours later, about dusk the prisoner compelled the witness to assist in taking the body about two hundred yards from the house, where he buried it; finding that the hole he had dug was not large enough to receive the body, he cut off the arms and legs and pressed these mangled and dissevered remains into the hole and covered them with an old quilt and dirt. This is, in substance, her account of the tragedy, which occurred in October, 1881. She states the prisoner, who is her step-father, threatened to kill her if she told, and kept constant watch over her to prevent her leaving home or having an opportunity to communicate with others. But that, finally, about three months after the killing, being relieved from his control, she did communicate the facts to others, and search being made the body was found in the mutilated condition described by her, and identified.

Several errors are assigned as grounds for reversal of the judgment. First, it is alleged that the prisoner was absent when two of the jurors were elected. It appears that ten jurors had been elected and the panel was exhausted; thereupon, the judge ordered other jurors to be summoned, and prisoner was removed from within the bar to the prisoner's dock within the court room, to await the sheriff's return of the additional panel of jurors. While the prisoner was in the

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dock, two jurors who had failed to appear on the call of the first panel came into the court room, and were passed by the attorney-general and accepted by defendant's counsel. During this time the prisoner, as stated by affidavit of one of his counsel, was handcuffed and in his dock, a distance of forty or fifty feet from the jury box, but took his seat by his counsel about the time the last of the two jurors was accepted by his counsel.

The record shows that this dock or prisoner's bench is about thirty feet from the judge's stand, and in full view of the whole court and jury, and defendant was in position to see and hear all that was done, and no objection made by defendant's counsel, they having exhausted nineteen challenges. We think the prisoner was in fact and in contemplation of law, present at this proceeding, and had the opportunity to have interposed objection to either juror, if he had desired to do so.

A prisoner should not, during his trial, be manacled or handcuffed; but should be left free from shackles, unless some such restraint should be necessary to prevent escape. In this case the proceedings had been temporarily suspended, to allow the sheriff time to summon additional jurors, and he removed the prisoner to the dock in the rear of the court room, and there handcuffed him, no doubt to prevent escape. While there, the two jurors appeared who had failed to answer upon the first call, and were passed by the attorney-general and accepted by prisoner's counsel, before he had returned to the side of his counsel—the

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last one being accepted by them about the time the prisoner seated himself by his counsel—and half an hour before the jury was sworn, affording ample time for objection, and all that occurred being at the time within the view and hearing of the prisoner. It was only intended he should be fettered during the suspension of proceedings, in making up the jury. But by inadvertence the jurors were accepted by his counsel before he took his seat beside them. This is not in conflict with the humane spirit of the law that requires a prisoner to be unfettered during his trial.

It is also objected that the jury were separated in returning from their room in the court house to the court room to render their verdict. In fact eleven of the twelve came into the court room in charge of one officer, a few yards ahead of the twelfth man, who was in charge of another officer, and there was no such separation as to vitiate the verdict.

It is also insisted that the court erred in admitting the confessions of the prisoner. It appears that Coleman, on whose farm prisoner lived at the time of the homicide, and who was present when the remains of the deceased were found, and to whom Bettie Hicks had narrated the facts of the killing, and Davis, chief of police, and another policeman and a reporter, went to the station house. Prisoner said, in answer to Coleman's question, that he did not know what he was in prison for, and asked him to get him out. Coleman replied, you are here for murdering Essick Polk. Prisoner said he knew nothing about it. Coleman said Bettie Hicks has told us all about it, when

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and where you killed him, how you cut him to pieces, and where you buried him, and we have found the body and buried it. Prisoner seemed excited and said he had trouble in his family and had killed him, but gave no details.

Kennedy, a newspaper reporter, states that Capt. Davis stated to Matthews about what Coleman had testified he had told him, and "that you had better tell us all about it—an honest confession is good for the soul." Thereupon his Honor, the judge, interposed and said, "that puts an end to the confession." The attorney-general insisted the witness was mistaken in attributing that language to Capt. Davis, and asking that he might retire for the present and refresh his recollection by an examination of notes he had made at the time of the conversation. This was allowed by the court; the witness then had a conversation with Capt. Davis in presence of the court, and remained in court, hearing Capt. Davis' testimony, who was examined. On being recalled he said, "He may have been mistaken in what he said Capt. Davis had said, and he was satisfied Capt. Davis' statement was the correct one.

When the witnesses were sworn and before the trial began, the court asked the defendant if he wished the witnesses placed under the rule; and his counsel replied that the "white witnesses" might remain in the court room. So there is nothing in the exception that Kennedy heard Davis' testimony. Nor is it reversible error, that one witness was discharged for a time, after a partial examination, and another substi-

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tuted. It is not said what particular point was discussed between the witnesses in the presence of the court, and although these proceedings were somewhat irregular and unusual, nothing is disclosed which we can see operated injuriously to the prisoner, and we cannot hold the rulings of the court in respect to these matters to be erroneous.

Capt. Davis testified as to what was said, substantially the same as stated by Coleman, and adds, they were about to leave the prisoner, and he saw he was about to confess, as he renewed the conversation, when the witness said to him "an honest confession is good for the soul," but he is positive he did not say "it would be better to tell us all about it." O'Haver, who was present, is also very positive that Davis did not say "you had better tell us all about it," or anything of the kind. Both Davis and O'Haver were police officers and state they were very careful to hear and remember all that was said. Under these circumstances the judge allowed the confessions to be given in evidence.

The material inquiry, upon the question of the admissibility of confessions is, whether they have been obtained by the influence of hope or fear, applied by a third person, to the prisoner's mind: 1 Gr. Ev. sec. 219.

If the prisoner should conclude, without a promise of some temporal benefit, that it would be better for him to confess, such confession would be admissible.

It is difficult to see, in anything which transpired at the time the confession in this case was made, that

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any promise or intimation of temporal benefit was held out as an inducement to confess. The language employed by Davis, that "an honest confession is good for the soul," is not a promise of temporal benefit or discharge from punishment for the crime charged, nor does it render the confession inadmissible: 1 Gr. Ev., sec. 229. So the statement that Bettie Hicks had told about the murder and that the body had been found was in fact true, and not a threat, to extort a confession.

Probably those facts made known to the prisoner, may have induced him to confess, under a strong sense of guilt and the conviction that his crime had been detected and exposed. But it cannot be said that they amounted to a promise of benefit, or threat of injury.

It is also insisted that Bettie Hicks, the only eye-witness of the homicide, has been impeached as a witness. One of the impeaching witnesses was herself impeached, and as to the other two, although they gave the name of the street on which they lived in Memphis, a policeman was unable to find any one who knew them. Bettie Hicks denies any acquaintance with them, and witnesses sustain her character. Upon a proper charge, the jury gave her credit.

We are of opinion, therefore, that there is no error in the record for which the judgment should be reversed, and it will be affirmed.

Bryant v. Bigelow & Hill.

N. A. D. BRYANT v. BIGELOW & HILL.

PLEADINGS AND PRACTICE. *Appeal. Garnishment.* An appeal, from a justice's judgment on garnishment, by the original debtor, does not bring up the case as to the garnishee, and he cannot amend his answer in the circuit court; the judgment of the justice is conclusive as to him.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. J. O. PIERCE, J.

— — — — — for plaintiff.

BIGELOW & HILL for defendants.

FREEMAN, J., delivered the opinion of the court.

Bryant obtained a judgment in 1877, before a justice of the peace for Hardeman county, for about seventy-five dollars, against C. H. & O. H. Britton.

Afterwards, the execution was certified to Shelby county, where another execution was issued. No property being found on which to levy, defendants Hill & Bigelow were summoned by garnishment process to answer what effects, etc., they had in their hands, of defendants. They appeared before the justice, and one filed an answer in writing, admitting the possession of certain notes belonging to the debtors—the other an-

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swering orally. Thereupon, the justice rendered a judgment against the garnished defendants for the amount due on the execution, to be satisfied by surrender of one of the notes—it being of larger amount than the debt.

From this judgment the original debtors appealed to the circuit court, but the garnished parties did not appeal or make any objection to the judgment. In the circuit court, the garnished defendants came in and asked to be allowed to amend their answer filed before the magistrate, and also to prove, as witnesses, the facts proposed to be presented by amendment. This was refused by the court on the ground that the garnished parties had not appealed, therefore the matters affecting them were not before the court, and the judgment conclusive.

Judgment was rendered affirming the judgment of the justice, from which they alone appealed. The correctness of this ruling is the only question before us for adjudication.

The plaintiff, the defendant, or the garnishee may appeal from the judgment rendered: Code, sec. 3492. The debtor, for instance, may show that the judgment has been paid or is legally satisfied: 6 Heis., 235; 8 Hum., 138. The garnished party may contest his liability to judgment on the facts shown in his answer, and either may appeal from the judgment on such questions.

But if the garnishee in a case like this fail to appeal, he submits to the judgment rendered against him, and it is conclusive. The only matter presented

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to the circuit judge by the garnishee, was a retrial of the merits of the judgment rendered on their answer, from which they had not appealed. The defendants in the execution made no objection to the original judgment against them, nor did they insist it was paid or discharged. This is not like the case of *Karr v. Shade*, 7 Lea, 295, where the original judgment was appealed from:

The court ruled properly, that the garnished defendants were not before it for the purposes of the motion made, and the judgment must be affirmed.

HENRY CALLIS *et al* v. LUCY COGBILL.

EJECTMENT. Eviction. Warranty. In ejectment, although the covenant of warranty is not broken without eviction by paramount title, yet eviction by judgment, by law is not necessary, the warrantee may voluntarily yield possession to him who had a better title and claim for a breach of the covenant. But in such case the party does so at his peril, and in a suit against the warrantor the burden of proof is upon plaintiff to show the paramount title. A judgment against him of paramount title would be conclusive on the warrantor.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

Callis v. Cogbill.

L. B. McFARLAND for Callis.

CRAFT and COOPER for Cogbill.

FREEMAN, J., delivered the opinion of the court.

This action is on a covenant of warranty in a deed for a small tract of land. It was tried by the judge of the Circuit Court without a jury, and judgment given for defendant.

The main question in the case is, whether there is shown such an eviction, either actual or constructive, as entitles plaintiffs to recover. On the question of actual eviction, the court, we assume, found the proof did not make out the fact—while we might possibly have found differently, there is proof on which such a finding may well be sustained. The judgment cannot, therefore, be disturbed on that question. It is, however, insisted that there has been an abandonment of the possession in obedience to the demand of the party having the superior title, and that a party having a warranty of title may well do this, and is not bound to go into a fruitless and expensive litigation in order to a technical eviction to entitle him to sue on his covenant—authorities clearly sustain this reasonable rule. It has been held—in numerous cases—“although the covenant of warranty is not broken without eviction by paramount title, yet eviction by judgment at law is not necessary; the tenant may voluntarily yield the possession to him who has a better title, and claim for a breach of the covenant”: Wait’s Act. and Def., vol. 2, 389, citing *Hamilton v. Cutts*,

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4 Mass., 349; 5 Clark, Iowa; 4 Hill, 643; 20 Texas, 673; 33 New Jersey L., 328. This is conceded by counsel of defendant in the brief. But it is maintained in such a case, the party does so at his peril, and in a suit against the warrantor the burden of proof lies upon the plaintiff to show the paramount title. The authorities sustain this principle: See Wait, *Id.*, and cases cited. The rule is founded on the sound principle that the vendor having himself parted with the possession and put his vendee in his place, he is bound to his warrantor, in good faith, to retain that possession, which may ripen into a perfect title, except as against a paramount title shown to exist, and if he surrenders the possession, he must be prepared to justify such surrender, by clearly making out the fact authorizing his act. While the general rule requiring an eviction has always been held in Tennessee, the principle has been extended in accord with the above rules to implied or legal evictions, and is not confined to literal and actual dispossession. The discharge by payment of an encumbrance, as a judgment, a lien on the land, was said to be equivalent to an eviction *pro tanto*, in the case of *Stipe v. Stipe*, 2 Head, 171, and the principle so stated, has been adjudged sufficient since then in several cases by this court: See *Kinney v. Norton*, 10 Heis., 388. So also in a case where the vendee purchases in a better outstanding title, he is entitled, under this covenant, to be re-imbursed the sum paid for it: See *Austin v. McKinney*, 5 Lea, 499.

These cases clearly recognize the principle stated.

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In all of them it is understood that the outstanding title, or the incumbrance, shall be made to appear as valid, subsisting and in case of an encumbrance, a charge that might be enforced as against the warrantee, against the purchased land.

The question then, is, have plaintiffs shown an abandonment or yielding the possession, in obedience to a paramount title? We think the abandonment is satisfactorily made out. The superior title depends on whether a decree in the case of *Melon v. Lucinda Cogbill et al.*, in the chancery court of Shelby county, rendered the 13th of April, 1874, is held conclusive of the title, and an estoppel on defendant. She was defendant in that case, and title paramount was asserted and claimed in that case, as against the title of her husband, the warrantor, in this case, she holding under him and by virtue of his title. She was his widow, he having died leaving no children. It was filed against the widow, and unknown heirs of the deceased husband. It adjudges distinctly and clearly the title of complainant Melon to be paramount to said widow and heirs, claiming under the title of the warrantor, as widow and heirs. No writ of possession, however, was ordered, and no possession was actually given under this decree.

We think this decree, under the principles of the decisions cited, should be held conclusive on the defendant as to the paramount character of the title thus asserted and decreed. If the party may pay off a judgment against his warrantor, that is a lien on the land, and thus make out an eviction *pro tanto*, it can

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only be on the principle that the judgment is held conclusive as against the warrantor. It certainly is not necessary to go behind this, and show that it was obtained on a proper existent liability of the warrantor justifying its rendition. If this be correct, it is not seen how the principle can be different, where the judgment or decree is either against the warrantor or against his privies in blood, having his title by descent and standing in his shoes—entitled to maintain his title. The general principle of a strict estoppel, where mutuality is required, is not the one involved here—but it is the conclusiveness of a judgment as to a fact directly in issue, where the party sought to be bound was defendant, had the means of contesting such fact, and the fact on such contest is established and adjudged against him. On this principle rests the conclusiveness of the judgment of incumbence that may be discharged by the vendee under our cases, and such discharge treated as an eviction *pro tanto*, and we hold the principle equally sound and applicable to the case of a judgment or decree adjudging a paramount title as against the warrantor or his privies in blood or by descent, as in this case.

The other question presented does not go to the merits, and need not be considered. The result is, that the judgment of the circuit court is reversed, and judgment given here for plaintiffs.

Kirby v. Insurance Co.

JOHN A. KIRBY v. PHOENIX INSURANCE COMPANY.

EVIDENCE. *Expert testimony. Insurance.* Upon the question as to whether it was a material change of risk for insured property to become vacant during the existence of the policy, the testimony of experts, as a matter of opinion, is inadmissible. If the fact, that vacancy increases the danger of loss by fire, the reason is susceptible of proof by introduction of facts that make it so.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

BIGELOW & HILL for Kirby.

U. W. MILLER for Insurance Company.

TURNER, J., delivered the opinion of the court.

The plaintiff insured a house in the city of Memphis in the company of the defendant for one year from May 27, 1878, at the sum of \$1000. The house was burnt on the 31st of March, 1879.

The third clause of the policy is: "All material, changes of risk or ownership shall be notified to the company and assented to in writing." Amongst other things, the defendant pleaded: "That by reason of the premises being vacant and unoccupied at the time of their alleged destruction by fire, there was a material change of risk without the knowledge or consent of defendant, the same becoming more hazardous and

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dangerous." At the time of procuring the policy the house was occupied. On the trial, the defendant introduced witnesses who were, or had been connected with insurance companies, and proved by them, as experts, that it was a material change of risk for insured property to become vacant during the life of the policy. Objection to the testimony was overruled.

The testimony was incompetent. The fact, if it be so, that vacancy increases the danger of loss by fire, if material and pertinent in this case under the policy, is not a thing to be established by experts as a matter of opinion merely. If it is so, the reason is susceptible of proof by the introduction of facts that make it so. The defendant, by its plea, confesses and avoids its liability. The burden is upon it to show the avoidance by facts establishing the truth of its plea. The charge of the court treating such opinions as evidence for the consideration of the jury, was erroneous.

Reversed.

Dupuy. v. Gorman.

PIERRE DUPUY v. JOHN GORMAN *et al.*

CHANCERY PLEADINGS AND PRACTICE. *Sale of land. Opening bidding.*

Where land has been sold by the clerk and master under a decree of the chancery court, and before confirmation the bid is raised, it is in the discretion of the chancellor to open the biddings and let them remain open in the master's office, and receive such bids as may be offered, instead of again selling after giving public notice. The discretion must be exercised as in other cases of judicial discretion subject to correction in case of abuse or gross error.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. R.
J. MORGAN, Ch.

H. C. KING for complainant.

J. E. BIGELOW for defendants.

FREEMAN, J., delivered the opinion of the court.

In this case the only question presented for adjudication is thus stated substantially in the petition for writs of error and *supersedeas*, presented to one of the judges of this court, who granted the *fiat* under which the case is now before us.

The property of petitioner, James Nolan, had been decreed to be sold by the chancery court in this case, by the clerk and master. At that sale, H. Clay King became the purchaser at the price of \$1000. A short time after this, one Thomas Gillooly, raised the bid

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before the master 10 per cent, tendered his note with security, which was satisfactory to the master, and his bid accepted, and the sale reported as made to him. Petitioner excepted to this report and asked that the sale be set aside, which exceptions were overruled, but at the same time the court ordered the bidding opened in the clerk's office for ten days, and then required the clerk to report the purchaser to the court. Petitioner excepted to this, insisting that he had a right in such a case to have the sale made under regular notice, as he says, which we understand to be, by being again advertised as required by law in case of sales in the first place, or at any rate, by public notice.

The order of the court directed no further notice, and that none was intended is evident from the fact that the defendant Nolan excepted to the action of the court at the time on the record, for this cause. The purchaser seems to have made no contest over the matter. The question presented is, whether in all cases the chancellor is bound to order a re-advertisement of the property, or public notice given of the fact that the biddings are opened, and stand open for all bidders, where he has re-opened the biddings, after a sale reported.

To this question there can, both in practical reason, as well as upon authority, be but one answer. It is, that while the general rule is as given by Judge Nelson in the case of *Click, adm'r. v. Burrus, et al*, 6 Heis., 545, that such notice shall be given. Yet, the chancellor may, in his discretion in a proper case,

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let the biddings remain open in the master's office, and receive such bids as may be offered, and confirm such sale when reported by the master, and it will not be a reversible error. This discretion must be exercised as in other cases of judicial discretion, subject to correction in case of abuse or gross error, but subject to this qualification is always allowable.

It is not unreasonable that such should be the practice. The property has been in such cases already advertised as required by law. The public, who take an interest in its purchase, have had opportunity to be informed of the fact, and that the property is to be disposed of under the direction of the court. The defendant being party to the proceeding is charged with notice of all the steps taken in the cause, and the bidder, a *quasi* party, by his bid, is in court for all purposes material to the protection of his interest.

If the party desires more competition—and this can only be on the part of the defendant, or some one interested in the sale—these facts should be shown to justify this court in saying that the discretion of the court has been injuriously exercised. No fact is shown tending to this result in this record. On the contrary, it very clearly appears to have been an effort for delay, rather than for any prospect of an increased price.

The fact is, opening the biddings, and the sale thus made, is a sale under the original order of the court, its completion only deferred to another stage by the process—the whole conduct of which may be safely left to the sound legal discretion of the chancellor's to

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be exercised under the principles we have laid down.

The authorities sustain this view, as the ancient and uniform rule of the court. In the case of *Morton, Smith & Co., v. Sloan*, 11 Hum., 279, 82, this court allowed the party who had advanced his bid to take the land at the advanced bid, without further biddings. This stands on the principle that the matter is in the legal discretion of the court, and to be fairly exercised on the facts of the case before it, and such is substantially the reason given by the court for its action: See p. 282-3.

In the case of *Vaughan v. Smith*, 3 Ch. Rep., 369, Judge Cooper, after referring to two other cases in which he had examined the authorities at large on these questions, gives the result most correctly as follows: "Up to confirmation, however, a bid gives the bidder no other rights than those he had before the master—that is, right to the property, if no one advances over him. The master cannot enlarge the time of the biddings beyond the period fixed by the order under which he acts, *but* the court may." He, therefore, in that case, opened the biddings, without any further notice. The authorities referred to in the case of *Mound City Mutual Ins. Co. v. Hamilton et al*, 3 Ch. Rep., 228, *et seq*, abundantly sustain the principle we have given, that the matter of opening the biddings and the mode of conducting them in such case is under the discretion of the court, to be exercised in view of the facts of the particular case, and in furtherance of the ends of legal justice.

The result is, that the decree of the chancellor is

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affirmed, and as in the case in 11 Hum., we direct that the advance bid of Mr. King be accepted, and the matter be closed. The purchaser has not, as we have said, prosecuted an appeal or writ of error. Costs will be paid out of the fund.

ROYSTER, WALDRAN & BACON v. MICHAEL MAGEVENEY.

REAL ESTATE BROKER. *Commissions.* If a broker is employed to sell property, and he first brings the property to the notice of the purchaser, and upon such notice the sale is effected by the owner, the broker is entitled to commissions.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

JARNAGIN & FRAYSER for Royster, Waldran & Bacon.

ESTES & ELLETT for Mageveney.

DEADERICK, C. J., delivered the opinion of the court.

This was a suit by plaintiffs to recover commissions for the sale of the defendant's property in Mem-

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phis. The verdict and judgment were for defendant, and plaintiffs have appealed.

The plaintiffs allege, that as real estate brokers, they were employed by defendant in 1877, to sell a certain store-house in Memphis, and that they procured a purchaser therefor, etc. There is also a count in the declaration for money paid, and work and labor done by plaintiffs. Without reviewing the facts, it is sufficient to say, that there is evidence sufficient to sustain a verdict either way. Plaintiffs insist that several errors were committed by the court in the progress of the trial.

First, it is argued that the court erred in rejecting the deposition of M. K. Meister, Jr. The only material facts stated in that deposition were such as deponent derived from conversations of R. Williams, Sr., with him. Williams was the party to whom the property was sold, was a competent witness in the case, and was, in fact, examined. There was no error in rejecting testimony of his declarations.

Exceptions were also taken to the charge of the court. The court charged the jury fully and correctly, in several different paragraphs, in substance, that a broker was entitled to his commissions if he produces a customer to the owner, if the owner is satisfied with such customer and sells to him, as the result of such introduction by the broker, even though the trade were effected by defendant. These propositions (6 in number), appear to have been requested by plaintiffs, and were given as asked. One other proposition which plaintiffs asked the court to charge, he refused, whether

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upon the ground that he had already given it, or for what reason, does not appear. It is as follows: "If you believe that plaintiffs were employed by defendant to sell the property in controversy, and that they first brought the property to the notice of the purchaser, Williams, and upon said notice, negotiations followed between Williams and defendant, and finally Williams bought said property of defendant, resulting from said negotiation," plaintiffs could recover, etc.

We see no objection to above proposition, but think it had been given in effect and substance several times in the charge. For example, the court told the jury if plaintiffs disclosed the name of the purchaser, or introduced him, and such disclosure or introduction was the foundation upon which negotiations were begun, and the sale was effected, plaintiffs will be entitled to recover. Again the court said to the jury, you must be satisfied plaintiffs were the efficient agents in, or procuring cause of the sale, and when the broker has commenced a negotiation for the sale, the owner cannot deprive him of compensation by taking that negotiation out of his hands and completing the sale himself. The law of the case was in these several propositions, submitted to the jury in all its material aspects.

But it is further insisted that the judge erred in charging, that "to entitle plaintiffs to recover in this case, you must be satisfied from the proof, that they were the efficient agents in, or procuring cause of the sale of the property to Williams in September, 1877, or that the plaintiffs being employed by the defendant for that purpose, found and introduced Williams to

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him, as a purchaser of the property, and that Williams was willing and able to purchase at the price and on the terms demanded by defendant, and that the sale resulted in consequence of such introduction.

The objection taken to this charge is, that it implies that a formal personal introduction is necessary. We do not think it was intended to be so construed, but the word was used in the sense of producing a purchaser, or finding one willing to purchase. It is further objected that the law does not require that the person produced should be *able* to buy it, if he did in fact buy, and was accepted as a purchaser by the owner. But although this may not have been technically correct, practically it was not an error to the injury of plaintiffs, as the record very clearly shows Williams' ability to buy, and that he did in fact pay, at the time of the purchase, in full for the property, and there is no evidence whatever to the contrary.

There is no error in the record, for which the judgment should be reversed, and the same will be affirmed.

Herzog and Uhlman v. Graham.

LOUIS HERZOG AND HENRY UHLMAN v. JESSE A.
GRAHAM.

PLEADINGS AND PRACTICE. *Declaration. False imprisonment.* It is a good defense to a declaration for false imprisonment, to show that the arrest was under lawful and valid process, issued by a competent tribunal, having jurisdiction. Under a declaration for false imprisonment plaintiff cannot recover upon proof showing a case of malicious prosecution.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

L. & E. LEHMAN for Herzog.

W. S. & J. R. FLIPPIN for Graham.

McFARLAND, J., delivered the opinion of the court

Graham brought this action. The first count of his declaration is for \$1000 damages for maliciously and illegally arresting and imprisoning him, or causing him to be arrested and imprisoned for — days from the — day of November, 1879, in the city of Memphis, Shelby county, Tennessee. The second count varies the statement thus: "for illegally and without probable cause arresting and imprisoning him," etc. The third count is "for maliciously, illegally and without probable cause arresting and imprisoning him," etc.

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The defendants pleaded not guilty, and also justified under legal process. The proof was that the plaintiffs and Herzog, one of the defendants, were in competition in business in Memphis. Uhlman was in the employ of Herzog. They—Herzog and Uhlman—concluded that the plaintiff was injuring their business, and therefore, Uhlman “swore out” a warrant against him for doing business without a license. The warrant was in due form, issued by a proper officer having jurisdiction, and the charge was one justifying the arrest. The warrant was delivered to a policeman, who arrested plaintiff, and detained and imprisoned him for a short time. Upon a hearing he exhibited his license and was discharged.

There was evidence showing that Herzog aided or encouraged the proceedings, and also that defendants might easily have ascertained that the plaintiff had a regular license to do business. The cause was tried by the judge without a jury, he found that the arrest was under process legal and good on its face, but as the process was obtained without any ground, therefore the action would be maintained and gave judgment for the plaintiff for \$200.

The error assigned, is that the declaration is for false imprisonment, and that it is a good defense to this action to show that the arrest was under lawful and valid process—issued by a competent tribunal having jurisdiction. That the plaintiffs cannot be allowed, under this declaration, to recover upon proof showing a case of malicious prosecution.

We are constrained to hold the point well taken.

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The first count in the declaration is the form for false imprisonment given in the Code, sec. 2939. The second count omits the word "*maliciously*," but avers that the arrest was illegal and without probable cause. The third is that it was "malicious, illegal and without probable cause." We think all the counts are for false imprisonment, and they have not the requisites of a declaration for malicious prosecution. The distinction is that false imprisonment is some interference with the personal liberty of the plaintiff, which is absolutely unlawful and without authority. Malicious prosecution is in procuring the arrest or prosecution under lawful process on the forms of law, but from malicious motives and without probable cause.

If the imprisonment be *illegal* the action may be maintained, although there be no malice, though malice will aggravate the damages, and the same may be said as to "probable cause." On the other hand, if the imprisonment be under lawful and valid process, the action for false imprisonment will not lie. If the process, however, has been sued out maliciously, and without probable cause, after the prosecution is ended, the party aggravated may maintain his action for malicious prosecution: See Waterman on Trespass, secs. 293, 307 and 367; Caruthers History of a Lawsuit, sec. 273. The declaration in such case should set out only the nature of the prosecution, that is, the nature of the process or legal proceedings resorted to. That it was malicious and without probable cause, and that the proceedings was ended. If in the present case the imprisonment was illegal, then the policeman who

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executed the process and made the arrest would also be liable to the action, but the process being regular and valid, and issued by a competent tribunal having jurisdiction, he would be protected, and those who aided and assisted him in the arrest and imprisonment, would be equally protected from the action for false imprisonment. Those, however, who procured the process to issue, or aided therein, are liable to an action for malicious prosecution, if they acted maliciously and without probable cause.

So, this case turns upon the question whether the declaration or other counts thereof makes a case for malicious prosecution, or whether they are all counts for false imprisonment. As we have seen, the first count is the form for false imprisonment prescribed by the Code. The word "maliciously" in this count is, perhaps, unnecessary, though malice in such cases, as we have seen, may aggravate the damages. The word "without probable cause" in the other counts, though appropriate to an action for malicious prosecution, are not of themselves sufficient to change the nature of the action, the other material averments being wanting. These counts but charge a case of false imprisonment, and add, unnecessarily, that it was without probable cause. If the declaration had contained a statement of the facts of the case, it would, under the Code have been sufficient without regard to the form. But the declaration only giving the defendants notice of an action for false imprisonment, and they having met this with a plea and proof showing they acted under valid legal process, it was error to allow a recovery upon a

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wholly different ground. While not disposed to be overly strict, we must still hold that the proof must be confined to the allegations in the pleadings, and which, after verdict especially, we would make every intendment in favor of the sufficiency of the pleading, yet we are constrained to hold that the proof and finding of the court below do not authorize a recovery under the declaration.

The judgment must, therefore, be reversed, and judgment rendered for the defendant.

Reversed.

ARMSTRONG v. WALKER.

RENT. Lien. Factor. A factor who sells cotton for a tenant and appropriates the proceeds to a debt due him, by consent or direction of the tenant, and with knowledge that his debtor is a tenant, is not liable to the landlord who has a lien for rent upon the cotton. The factor is not a purchaser, but a seller, and is not liable to the landlord, under the statute, as a purchaser. The fact that the tenant paid him the proceeds, does not make him a purchaser of the crop as required by the statute to make him liable.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

Armstrong v. Walker.

W. B. GLISSON for Armstrong.

WALKER & METCALF for Walker.

FREEMAN, J., delivered the opinion of the court.

This case presents the question, whether the landlord, by virtue of his lien for rent on the crop growing on the rented land, can recover of the factor or commission merchant of the tenant, who sells the cotton for the tenant, and appropriates the proceeds to the payment of a debt due such factor, by consent or direction of the tenant—he having notice that his debtor is a tenant.

By the act of 1857-8, ch. 52, sec. 3; Code, sec. 3542, our law on this subject was amended as follows: "And the person entitled to the rent may recover from the purchaser of the crop, or any part of it, with notice of the lien, the value of the property, so that it does not exceed the amount of the rent and damages."

The facts show that Armstrong, or his firm, had received this cotton from the tenant and sold it for him. They cannot be held to be purchasers of the crop, for the simple reason, that they were the sellers instead, and sold to a third party—that third party is a purchaser, and as such, if he had notice of the facts, would be liable under the statute.

It is only the case of a party selling property as an agent, on which, as between his principal and a third party, a lien was fixed. The fact that the tenant paid him the money on his debt, does not make

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him the purchaser of the the crop, as required by the statute, in order to his liability.

We think it would be an arbitrary extension of the remedy given by the statute to construe such a party to be a purchaser, within its terms—such as ought not to be done. The circuit judge held otherwise, and his judgment must be reversed and judgment for defendant.

D. T. VARNELL *et al* v. JOHN LOAGUE.

ADMINISTRATION. *Letters granted to public administrator within six months.*

The provisions of the act authorizing the appointment of public administrators disclose a legislative intent that the parties interested in the estate of a decedent, should have six months within which to apply for administration in the usual way, and if letters have been granted to the public administrator, the probate court may, upon the application of the parties, within the six months, revoke the letters.

FROM SHELBY.

Appeal from the Probate Court of Shelby county.
T. D. ELDRIDGE, J.

W. B. GLISSON for Varnell.

W. M. RANDOLPH for Loague.

Varnell v. Loague.

COOPER, J., delivered the opinion of the court.

On January 25, 1881, Gray Varnell, a citizen of Shelby county, departed this life in that county, intestate. On the 3d day of the next month, one Marion Crosser, filed his petition in the probate court of Shelby county, stating that he was in possession of certain money and effects, the property of the estate of the deceased, and asked that John Loague, the public administrator of the county, be granted letters of administration on the estate. On the same day, the court ordered letters to issue as prayed. Loague, as public administrator, and without giving a separate bond, thereupon took possession of the estate, and proceeded to administer upon it.

D. T. Varnell and others, the next of kin of the intestate, and non-residents of the State, came into the probate court by petition, on February 13, 1881, and asked that the letters granted to Loague be revoked, upon the ground that, under the statute authorizing the appointment of a public administrator, letters could not be granted to such administrator until six months after the intestate's death. They further asked, that N. Calhoun, a citizen of the county, who joined in the petition, be appointed administrator in the usual way. This application seems to have been withdrawn, but was, afterwards, upon a more formal petition, renewed on the 23d of June, 1881. The petitioners expressed their willingness, however, to sanction the appointment of Loague, if he would immediately account for, and pay over the assets upon refunding

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bond, there being no debts of the estate. Loague answered the petition, and declined to make any settlement of his administration before the expiration of two years from the grant of letters. The cause was heard June 28, 1881, and the court revoked the letters issued to Loague, and appointed Calhoun administrator, upon his executing the proper bond. From this decree, Loague has appealed to this court.

The jurisdiction of the county court in this State over the subject of administration, with which jurisdiction the probate court of Shelby county is clothed, is original, general and exclusive, and the presumption is in favor of the proper exercise of its power: *Brien v. Hart*, 6 Hum., 131. But before the issuance of letters of administration, the administrator must give bond in double the value of the estate, with two or more securities, conditioned for the faithful performance of his duties: Code, sec. 2222. On February 2, 1871, the Legislature authorized the county courts to appoint public administrators for their respective counties, upon their giving bond, with two or more approved securities, in such an amount as will be amply sufficient, in the discretion of the court, to protect the estates which may come to the hand of the administrator. This act is brought into the Revised Code, sec. 468 a. By sec. 468 a, of the act, it is provided, that should any person entitled to the administration of an estate fail to apply to the court having jurisdiction, and take out letters of administration, within six months after the death of the intestate, it shall be the duty of the public administrator to enter upon the administration

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of the estate, first applying to the county court for necessary letters of administration.

The contention of the next of kin in this case is, that letters of administration, granted to the public administrator within six months after the death of the intestate, are void, and that it is the duty of the court, upon the application of the next of kin within the six months, to revoke such letters, and appoint an administrator in the usual way. On the other hand, it is intended that the letters granted are not void, and should not be revoked except upon the application of some party entitled to the administration; that the next of kin are not applying for the appointment of either one of them, or any other person entitled to administration, but simply of a person of their selection.

It seems very obvious that the Legislature intended that the parties interested in the estate of an intestate should have six months within which to apply for administration in the usual way, and that the public administrator should have no right to demand letters until the expiration of that time. It does not follow that the grant of letters within the time would be void, nor is it necessary to make an authoritative ruling on the point in this case. But we are clearly of opinion that the next of kin have the right, within the six months, to have the estate administered in the ordinary mode, and for this purpose, to apply to the court for a revocation of the letters issued to the public administrator. The power to revoke letters of administration in a proper case is well settled in this

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State, and follows necessarily from the plenary jurisdiction of the court over the administration: *McGowan v. Wade*, 3 Yer., 375; *Wilson v. Hoss*, 3 Hum., 142; *Wilson v. Frazier*, 2 Hum., 30.

The judgment will be affirmed, with costs against the appellant, and the cause remanded for further proceedings.

R. H. OGBURN *et al* v. J. T. DUNLAP *et al*.

CHANCERY PLEADINGS AND PRACTICE. *Consolidated causes. Appeal.* An order of the chancellor, made upon the final hearing of independent causes, directing the causes to be consolidated and heard together, will leave each case to be tried upon its own pleadings, proceedings and proof, and an appeal by the complainants in one of the bills will only bring up their case, leaving the other causes in the court below, and the decree as to them in full force.

FROM HENRY.

Appeal from the Chancery Court at Paris. John Somers, Ch.

W. A. DUNLAP and ADEN & FRYER for complainants.

GREER & WILLIAMS for defendants.

Ogburn v. Dunlap.

COOPER, J., delivered the opinion of the court.

On January 6, 1869, James T. Dunlap sold and conveyed to James T. Dunlap, Jr., his son, a tract of land in Henry county, "in consideration of \$3,000 in three equal annual instalments, with interest from date." The purchaser executed to his father his three notes accordingly. The deed conveying the land was absolute, without reserving any lien for the payment of the purchase notes, but showing the consideration as above.

On June 1, 1869, James T. Dunlap, Jr., conveyed the same land to W. D. Lannom, in trust, to secure a note of James T. Dunlap, Jr., of even date, payable one year thereafter to James H. Harrell, for \$720. This note was assigned to W. A. Tharpe, and he, on February 24, 1875, filed the first of the bills in this record against James T. Dunlap, Jr., and, by amendment, against the heirs of Lannom, who had died, to enforce the trust assignment for the payment of the debt.

On March 21, 1870, James T. Dunlap, the father, assigned to James R. Allen the second and third notes of James T. Dunlap, Jr., given for the land, waiving demand and notice. On the same day, James T. Dunlap, Jr., conveyed the land, for which the notes were given, to James R. Allen, in mortgage, to secure the payment of the two notes thus assigned to him by James T. Dunlap, Sr., subject to the prior deed to Harrell. On February 24, 1875, John A. Allen, and others, the personal representatives and heirs of James

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R. Allen, who had died, filed the second of the bills in this record, against the two Dunlaps, James H. Harrell, and three of the Allen heirs, who were infants, and the guardian of two of them. The object of this bill was to foreclose the mortgage made by James T. Dunlap, Jr., to James R. Allen, subject to the Harrell trust deed, so far as it secured the purchase note of James T. Dunlap, Jr., falling due three years after date, this note belonging to Allen's estate. The other note seems to have gone back into the hands of James R. Dunlap, Sr.

On January 10, 1871, James T. Dunlap, Sr., assigned the first and second of his son's notes to his two daughters, Sarah A. and Ellen J. Dunlap, "together with the lien." On May 20, 1876, R. H. Ogburn and wife, Ellen J., formerly Ellen J. Dunlap, and Sarah A. Dunlap filed the third of the bills in this record against the two Dunlaps, father and son, to enforce the original vendor's lien or equity on the land sold by the father to the son for the unpaid purchase money. This bill simply states that Wm. A. Tharpe had filed a bill to enforce a subsequent deed of trust, and that John A. Allen, and others, who had filed another bill to enforce a still subsequent mortgage. The complainants ask that this bill be heard with those causes, but without making the complainants in those suits parties to the bill.

These three suits were all proceeded with separately, and prepared for hearing. They were, however, heard together, the final decree reciting that "these causes came on to be heard upon bills, answers, exhibits, *pro*

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confesso and proof; whereupon, it was ordered by the court, that said causes be consolidated and heard together, which was accordingly done." The chancellor gave the complainants in each bill a recovery against James T. Dunlap, Jr., for the debt due the complainants respectively, and ordered the land to be sold in satisfaction thereof, the proceeds of sale to be first applied to the payment of the Tharpe debt; next, to the payment of the Allen debt; and any surplus to the complainants in the last bill. These latter complainants have brought the record into this court by writ of error.

The appellants, Ogburn and wife, and Sarah A. Dunlap, are only parties to their own bill, the defendants to which are the two Dunlaps. It is obvious, therefore, that the writ of error only brings up the bill of the appellants, and the proceedings had therein, unless the chancellor's order of consolidation changes the result. But this court has repeatedly held that a mere order of consolidation of two or more causes cannot change the rules of equity pleading in the rights of the parties. These rights must still turn upon the pleadings, proof and proceedings in the respective causes: *Brevard v. Summers*, 2 Heis., 105; *Lefland v. Coward*, 12 Heis., 546; *Mowry v. Davenport*, 6 Lea, 80; *Estill v. Decherd*, 4 Baxt., 515; *Masson v. Anderson*, 3 Baxt., 290. And it is very doubtful whether the chancellor has any powers to interfere with the rights of the parties, *in invitum*, by an order directing the consolidation of independent suits of purely equitable cognizance: *Ogden v. Knight*, 3 Tenn. Ch., 409. The

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reason is, that in order to give a court of chancery jurisdiction in any cause, it must have the parties before it by proper process, or appearance, and formal pleadings presenting the issues to be tried between the parties: *Randolph v. Merchants National Bank*, MS., opinion at this term. For the same reason, the court cannot permit new parties to come in as defendants against the wishes of the complainants: *Comfort v. McTeer*, 7 Lea, 652. By the very nature of a court of equity, there must be orderly pleadings between litigant parties, fairly embodying the facts upon which the court is called, in favor of one party, to effect the conscience of another.

The case before us is a striking example of the necessity of adhering to these rules. The appellants seek to have the notes held by them declared to have the first lien on the land in controversy, because of the vendor's equity for the unpaid purchase money, no lien for the security of the purchase notes having been retained on the face of the deed. But the vendor's equity may be waived, and no issue has been made between the parties in interest to authorize the introduction of evidence on the point. The bill of the appellants says that the notes held by them were assigned to them by James T. Dunlap "for a *bona fide* consideration." Such a consideration might be love and affection. The note to Harrell of \$720, and the trust deed to secure it, was made on June 1, 1869. In their joint answer to the Allen bill, the two James T. Dunlaps say that this note was given for money loaned by Harrell to James T. Dunlap, Jr. And on

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the first note of James T. Dunlap, Jr., to his father, and which was assigned by him to the appellants, there is a credit of the date of June 1, 1869, of \$720, the exact amount, and of the same date of the Harrell note. If, now, the issue of the waiver of the vendor's equity were made, it might be shown that the money thus obtained was for the accommodation of the vendor, and that he was a party to the arrangement between James T. Dunlap, Jr., and Harrell. In such a case, it would be difficult to resist the inference that the vendor intended to waive his equity in favor of Harrell.

Moreover, in the Allen mortgage the priority of the Harrell debt is again recognized. That mortgage was made on the same day that the father assigned the two purchase notes to Allen, and, it may fairly be inferred, as a part of the transaction, and for the accommodation of the father. In that event, it would be difficult to resist the conclusion that it was intended to waive the vendor's equity in favor of Allen, and of course in favor of Harrell. The equity once waived would be gone forever.

If these facts could be looked to, the chancellor's decree would probably be found correct. But in determining the rights of the appellants, we cannot look outside of the pleadings, proof and proceedings in their own suit, to which they and the Dunlaps alone are parties. In this view, the decree of the chancellor, in so far as it gives the complainants a judgment against James T. Dunlap, Jr., on his purchase notes with costs, and order a sale of the land in satisfaction

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thereof, under the vendor's lien, is correct. The decree is erroneous in undertaking to declare the priorities between these complainants and the complainants in the other suits.

The decree below will be modified accordingly. But inasmuch as the appellants have gained nothing by the appeal as against the defendants to their bill, they will pay the costs of this court. The other cases are not brought up by the appeal, and the decrees therein below, as between the parties to the suits, will remain unaffected by the decree in this court.

L. A. BEDWELL *et al* v. T. E. JONES *et al*.

AND

THE DR. HARTER MEDICINE COMPANY *et al* v. JOHN
R. RAMSEY, Adm'r. *et al*.

1. SCHOOL FUND. *County trustee may sue for.* The county trustee may maintain a bill in chancery against the sureties of a defaulting former trustee, for an account of monies collected for the use of common schools.
2. CHANCERY COURT JURISDICTION. *Statute giving concurrent jurisdiction.* In all cases where the chancery court had original jurisdiction, a subsequent statute, without prohibitory or restrictive words giving a remedy by motion, confers concurrent, and not exclusive jurisdiction.

FROM CARROLL.

Appeal from the Chancery Court at Huntingdon.
JNO. SOMERS, Ch.

Bedwell v. Jones.

J. R. & S. W. HAWKINS for complainants.

HAWKINS & TOWNSEND and ALONZO HAWKINS for defendants.

FREEMAN, J., delivered the opinion of the court.

The first of these cases involves the question, whether the superintendent of public schools of Carroll county, and trustee, and school directors of the various districts of said county, or any of these parties, in their official capacity, can maintain a bill in chancery against the sureties of a defaulting former trustee, for an account of monies collected by him in the county for the use of common schools, or as charged in the bill, money belonging to the public school fund of said county?

The chancellor held they could not, and on motion, dismissed the bill, from which they have appealed to this court.

It is said in argument, that the chancellor put his decree on the ground that the remedy of the party entitled to the fund was by motion—therefore, a bill would not lie—assuming that some, or any one of the parties complainant, were entitled to demand and receive the money in the hands of a delinquent trustee who had received it. We think this was probably the only plausible ground on which the holding of his Honor could stand.

We think it clear, from a fair construction of the statutory provisions of our law in reference to the school fund of the county, such as are now in contest,

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that the county trustee, by virtue of his office, and as such, is the legally constituted custodian of them. By the act of 1873, sec. 38, and subsequent sections, the school tax, whether levied by State or county, is ultimately to be paid over to the county trustee of the county. By section 20, of this act, the directors are to receive the fund apportioned to their respective districts, by drawing warrants upon the county trustee in favor of the treasurer, for the monies due their district.

This was changed by the act of 1879, ch. 129, sec. 1, which provides, that the directors shall "draw upon the county *trustee* in favor of the teachers of their districts for any school money due such teachers, in the hands of the trustee for distribution in their districts, etc. The warrants to be approved by the county superintendent before paid by trustee. It is further provided, that he shall hold the funds in his hands (subject to these warrants), and make to the county superintendent on the 15th of September of each year, a full and complete report of the amount of money received by him for school purposes, and the disbursements of the same."

By sec. 427, sub sec. 9, of the Code, it is provided that upon the resignation or going out of office by the appointment of another person, it is the duty of the trustee "to deliver" to his successor all his official books, etc., and by the next section, to make settlement with the revenue commissioners, and pay over balance found in his hands to his successor.

Other statutes, perhaps, involve similar duties. It is

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clear from these cited, that the county trustee, for the time being, is the proper custodian of these funds, and it was the duty of the delinquent to have settled and paid over the balance in his hands to his successor, and his sureties on his official bond were, beyond doubt, responsible for his failure to perform the duty thus imposed.

Concede this, and then we hold it follows that the county trustee was entitled to enforce, by some proceeding, the performance of the duty, and to assert his right to the fund, which he was charged to receive, by the requirement that it should be paid over to him by the predecessor in office.

If there had been no provision for a motion, or summary proceeding, unquestionably a court of chancery had original jurisdiction to decree an account of monies so in the hands of the previous incumbent, and not paid over. This, we assume, no one would deny.

If one of the axiomatic principles of equity jurisprudence, that "if originally the jurisdiction has attached in any class of cases, such jurisdiction is not taken away by subsequent statutes conferring upon courts of law the same power without prohibitory or restrictive words. When no such words are employed, the uniform interpretation is, that such statutes confer concurrent, and not exclusive jurisdiction: *Waits Act. & Def.*, vol. 3, p. 207, sec. 12, and numerous cases cited. And so the principle has been repeatedly held by this court: *Bright v. Newland*, 4 Sneed, 442.

In the case of unpaid taxes, which were a lien on land by the statute, and which had been enforceable

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by sale of the land, in accord with special provisions of our revenue statutes, this court held, on this principle, that a court of equity having original jurisdiction to enforce liens, might be resorted to in a case within its jurisdiction, and the land subjected to the discharge of the lien in this way in such court. On these principles, which we deem beyond all question, we hold his Honor erred in dismissing the bill in this case, as to the county trustee. He was correct, however, as to the other parties. The statutes we have cited show clearly, that the other officers had no right to demand the fund to be paid to them directly, but only to direct its payment as provided, so far as directors are concerned, and to approve the warrant, so far as county superintendent had any duty to perform in this aspect of the case.

We only add this is decisive of the correctness of his Honor's ruling in the other case, when he dismissed the petition in the insolvent proceeding as to all the parties, except the trustee, but allowed him to prosecute his claim.

We need only say in conclusion, that while the school districts may sue and be sued as provided, they are not entitled in their corporate capacity, so far as we see, to receive or rather demand, the fund from the trustee, but the same is to be received through the directors, in the mode pointed out by the statutes cited.

The result is, the chancellor's decree is reversed with costs in the one case, and affirmed in the other.

Smyth v. Barbee.

A. M. SMYTH *et al* v. H. P. BARBEE *et al*.

CHANCERY PLEADINGS AND PRACTICE. *Bill by sureties in replevin bond, after judgment.* A bill will not lie by the sureties in a replevy bond, after a judgment on the bond in the suit in which it was given, valid on its face, merely upon the ground that the interest of the principal in the goods replevied was that of a partner in a firm insolvent at the time of the attachment, the bill not being good as a bill of review, nor as an original bill to impeach the judgment for fraud.

FROM WEAKLEY.

Appeal from the Chancery Court at Dresden. JOHN SOMERS, Ch.

M. D. CARDWELL and H. H. BARR for complainants.

ROGERS & EDWARDS for defendants.

COOPER, J., delivered the opinion of the court.

On September 2, 1870, the defendant, H. P. Barbee, filed his bill against James H. Leigh, for a partnership account between them, and claimed a balance due to him of about \$180. In the progress of the cause, Barbee sued out an attachment against the estate of Leigh, which was levied "on the goods, wares and merchandise now in a store house, known as the store house of Leigh and Phelps, in the town of Gleason, as the property of the defendant, James H. Leigh." Leigh replevied the goods by giving a bond,

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with the present complainants, Smyth and others, as his sureties, in the penalty of \$500, "conditioned to deliver up said property to the said Andrew Corson (the deputy sheriff who made the levy), or any other officer of said county legally authorized to receive it, whenever requested to do so by any decree or order of said chancery court." Such proceedings were had in the cause that, on January 22, 1873, a decree was rendered in favor of Barbee against Leigh for \$167.96, and costs, and the court, by said decree, after reciting the issuance of the attachment, the levy upon the goods, and the execution of the replevy bond as aforesaid, ordered James H. Leigh to deliver to the clerk and master of the court, within thirty days, the property so levied on, and, in default thereof, ordered, adjudged and decreed, that complainant recover of the defendant, and the sureties on the bond, naming them, the said sum of \$167.96, and the costs of the suit.

No appeal was taken from this decree, and the same remains in full force. On March 20, 1873, the sureties of Leigh, on his replevy bond, against whom the judgment was rendered on the bond, filed this bill to enjoin the execution of the judgment. The substance of the bill is, that the property levied upon was the property of the firm of Leigh & Phelps, not of Leigh alone; that the interest of Leigh was only what would remain after paying the partnership debts; and that nothing would remain. There is evidence tending to show these facts, but the business continued to be conducted by Leigh for a year after the levy, and then his stock of goods on hand was sent by him to Arkansas.

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The judgment rendered on the replevy bond was justified by the facts as recited by the decree, under our statutes, in relation to such bonds, the goods replevied having been attached as the property of the principal: *Kuhn v. Spellacy*, 3 Lea, 278. A bill of review would not, therefore, lie for error apparent: *Ward v. Kent*, 6 Lea, 128. Nor is any error of law pointed out, as is absolutely required, to sustain such a bill: *Brown v. Severson*, 12 Heis., 381. The bill does say that "errors of fact" were committed, but without pointing out the errors. Nor does it state any new matter which could not, with ordinary diligence, have been then had: *Burson v. Dosser*, 1 Heis., 754. An original bill to retry the cause, cannot, of course, be entertained, in the absence of fraud, however erroneous the decree may in reality be: *Frazer v. Sybert*, 5 Sneed, 103; *Rodgers v. Dibrell*, 6 Lea, 76. Moreover, want of title in the attachment debtor to the property replevied is no defense to judgment on the bond: *Stephens v. Greene County Iron Company*, 11 Heis., 715. Nor, *a fortiori*, a possible want of interest as the result of a partnership account. The replevy is an admission of interest sufficient to sustain the bond, the principal's title being conceded.

The chancellor's decree on the original bill will be reversed, and the bill dismissed with costs. But the appellant, Barbee, will pay the costs of his cross-bill, as ordered by the chancellor, and the costs of so much of the transcript of this court as consists of the record of the suit of Barbee v. Leigh.

Henry v. Wilson.

J. S. HENRY v. J. D. WILSON.

1. CONDEMNATION of LAND. *Revivor*. A *renditioni exponas* may issue on a judgment condemning land tested at a subsequent term, without revival of the order. The testimony of the judgment debtor alone will not be sufficient to impeach the return of an officer on an execution that he had given notice of a sale thereunder, as required by law.
2. HOMESTEAD. *Abandonment*. Previous to the act of 1879, the homestead right may be lost by the abandonment of the occupancy by the head of the family.

FROM HENRY.

Appeal from the Chancery Court at Paris. JOHN SOMERS, Ch.

COLE & SWEENEY for complainant.

J. N. THOMASON for defendant.

COOPER, J., delivered the opinion of the court.

Ejectment bill, the complainant claiming title under an execution sale of the land as the property of the defendant. The execution was issued on a justice's judgment, and levied upon the land on August 23, 1875. The papers were returned to the circuit court, and, at the January term, 1876, an order of condemnation was entered. At the September term, 1876, the order of sale was renewed. On November 23, 1877, an *alias renditioni exponas* issued, under which the land was sold to the complainant on December 31, 1877.

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The sheriff's deed bears date July 22, 1879. Both in his return and in his deed, the sheriff states that the sale was made after having advertised and given notice as required by law. The defenses relied upon by the defendant in his answer, and insisted upon by his counsel in argument, are:

First. That the *renditioni exponas*, under which the sale was made, issued without authority of law.

Second. That defendant had no notice of the time and place of sale.

Third. That defendant was residing on the land with a wife and two children at the time of the levy of the execution, the debt on which the judgment was recovered having been created in 1874.

The ground of the first of these defenses is, that the record of the condemnation proceedings shows no renewal of the order for a *renditioni exponas* after the September term, 1876. But a *renditioni exponas* is an execution: *Rogers v. Jennings*, 3 Yer., 310; *Webb v. Armstrong*, 5 Hum., 379. The order for its issuance stands like the order for a *feri facias* in an ordinary judgment. At common law, the *feri facias* was required to be issued from term to term, but this requirement was so much a matter of form that if a lapse occurred, the judgment plaintiff might make the entry on the judgment roll *nunc pro tunc*. Even the form has been abandoned in this country, and the execution issues, as of course, as long as the party is entitled to it.

The second defense is sustained by the defendant's testimony alone, against which is not only the pre-

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sumption of law that the officer did his duty, but his return on the execution, and the recital of the deed to that effect. And it has been settled on the soundest principles of public policy, that the testimony of one witness, and, *a fortiori*, if that witness be the party interested, will not suffice to impeach an officer's return: *Hunter v. Kirk*, 4 Hawk., 277, *Mason v. Miles*, 63 N. C., 565; *Drirer v. Cobb*, 1 Tenn. Ch., 490. "It would not do," says this court, "to set aside the official acts of officer's upon the simple denial of the party himself, unsupported": *Tatum v. Curtis*, 9 Baxt., 360.

The defendant's case rests, therefore, upon the claim of homestead. The proof is, that for several years before 1874, and for part of that year, the defendant had lived on the land in controversy, with his family. The land lies near the Kentucky line, and within half a mile of the residence of the father of defendant, who lives in the State of Kentucky. The proof is, that sometime in 1874, the defendant left his wife and family, and went to his father's house in Kentucky, declaring his intention never to live with his wife again. On April 24, 1875, he filed a petition in the circuit court of Calloway county, Kentucky, against his wife for a divorce, which purports to be sworn to by him. In this petition, he states that he is a resident of Calloway county, and has been, without interruption, for one year past. The deposition of a brother of the defendant is taken to sustain the petition, on November 1, 1875, who testified that the defendant had resided in Calloway county about ten

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months. The defendant and the same brother testify in this case, that defendant was living on the land in controversy, in the year 1875.

The proof is clear, that the defendant's wife, in February or March, 1875, after she had been deserted by her husband, was taken, with her children, by her brother to Dyer county, and there remained until about the close of the year 1876. The defendant seems to have joined her in that county about October, 1875, and remained there with his family, until near the end of the year 1876. The weight of the testimony is, that the house was vacant the greater part of the year 1875, and certainly in August of that year when the execution against the defendant was levied upon it. And it was rented to, and occupied by a tenant in 1876.

There was such an abandonment of the homestead occupation as left the property open to an execution levy: *Roach v. Hooker*, 2 Lea, 633.

The chancellor's decree must be reversed, and a decree rendered here in favor of the complainant, declaring his right to the property in controversy, and ordering a writ of possession, and an account for rent. Defendant will pay the costs of the case.

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LOUISVILLE, NASHVILLE & GREAT SOUTHERN R. R. CO.
v. GEORGE W. HARRIS.

1. RAILROAD. *Passenger. Conductor.* A traveler on a railroad train, traveling on a commutation coupon ticket, which provides that the coupons shall be void if detached by any other person than the conductor, and that the ticket shall be shown to the conductor each trip, who shall detach the coupons for the number of miles to be traveled, technically violates the contract by detaching the coupons himself. If, while detaching the coupons, his attention be called by the conductor to the fact that it is his duty to detach them, the passenger should at once desist, and hand the ticket and coupons to the conductor, in which event it would be the duty of the latter, if he saw the coupons detached or could readily ascertain by inspection that they had been detached from the ticket, to accept them. But the conductor would not be bound to receive the detached coupons without seeing the ticket.
2. SAME. *Same. Same.* If such a passenger refuse to deliver his ticket to the conductor on demand, and insist upon making payment of his fare with coupons which he has himself detached, it would be a violation of the contract by him, for which he may be put off the train, with such force as may be necessary, in case he refuse to go voluntarily; and he cannot, while being lawfully ejected, regain the right to passage by a tender of his fare in a rude, boisterous or insulting manner.
3. SAME. *Same. Same.* The weight of authority is that a passenger, who has first violated the contract of passage by a failure to pay his fare at the proper time upon demand, cannot, by tendering the fare when he is being put off, or upon a re-entry after ejection, acquire a right of passage, but the strict rule ought, perhaps, to be confined to willful violations of contract.

FROM CARROLL.

Appeal in error from the Circuit Court of Carroll county. C. ADEN, J.

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COLE & SWEENEY for Railroad.

ALONZO HAWKINS for Harris.

COOPER, J., delivered the opinion of the court.

Harris brought this action against the railroad company, and recovered damages for being ejected from the train. The company appealed in error.

Harris was traveling as agent for Johnson, Newman & Co., upon a commutation ticket issued to that company for several thousand miles, with coupons attached, and put up in the form of a book. The contract expressly provided that the ticket should be shown to the conductor each trip, who will detach such coupons as would represent the number of miles traveled by the holder on his train, and that the coupons would be void if detached by any one but the conductor. Each coupon stated that it was good for a given number of miles, "when not detached from the contract." The plaintiff says he knew that the coupons were void if detached by any other person than the conductor. He got on the train with the commutation ticket to go to a point named about twenty-four miles distant. When he saw the conductor coming on his round for tickets, he took his book from his pocket, and commenced detaching some of the coupons, when the conductor told him he need not do that, for he would not take them. Plaintiff replied, "I guess you will." The conductor said, "I am employed to do that," and added, "you will pay your fare." Plaintiff replied, "here is my fare," and

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offered him the detached coupons. Here there is a conflict in the testimony as to what took place. The conductor and another person present say that the conductor asked for the plaintiff's book, which the plaintiff refused to let him have, saying that the conductor might put him off and he would sue the company. The plaintiff, and a witness present also at the time, deny that the book was demanded, but agree that angry words were interchanged between the plaintiff and the conductor. The colloquy wound up by the conductor telling the plaintiff that he must get off at the next station, the plaintiff replying that he would not, and the conductor replying that he would put him off. When the train stopped at the next station, the conductor said to the plaintiff: "This is the station and you must get off." The plaintiff replied: "You will have to put me off." The conductor took hold of the lapel of the plaintiff's coat and jerked him up, but immediately released him, and told plaintiff to get off the train. Plaintiff said he would not do it. The conductor then got behind plaintiff and pushed him along the aisle to the front end of the car, and out of the front door. On the front platform an acquaintance of the plaintiff was standing, and plaintiff called upon him to witness that he had tendered his fare to the conductor. The plaintiff, having his book with the detached coupons in his left hand, held them out to the conductor, and said to him: "Here is my ticket, and I tender you my fare," and, with an oath, "I dare you to put me off." The conductor then pushed him off the car on to the plat-

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form of the depot. The coupons, it should be added, seem to have been detached by the plaintiff in the presence of the conductor, either wholly or partially.

The plaintiff had a right to be carried to his place of destination in the defendant's train on paying the usual rate of fare on demand, and according to the terms of the contract under which he was traveling. Those terms were that the ticket should be shown to the conductor, who would detach the coupons. It was a technical violation of the contract, by which the coupons were rendered void, for the plaintiff to detach the coupons himself. Upon having his attention called to the fact that it was the conductor's duty to detach the coupons, he should at once have desisted, and handed the book and coupons to the conductor. If he had done so, and the conductor had seen the coupons detached, or could have readily ascertained by inspection that they had been torn from the book, it would have been the duty of the conductor to have received the coupons. But he was clearly not bound to receive the detached coupons without seeing the ticket or book. The plaintiff's proof tended to show that the conductor had not demanded the book, and that the book was not tendered to him until, in the process of ejection, the parties had reached the front platform. The defendant's proof was that the conductor had demanded the book, and the plaintiff had refused to deliver it. And the remark of the conductor, testified to by the plaintiff himself, "that he must take him for a damned thief," strongly sustains the defendant's version of what occurred, for, otherwise,

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the expression would be unmeaning. Be this as it may, the real contest was over what took place before the tender on the front platform, and the effect of that tender. If the plaintiff refused to deliver his ticket to the conductor on demand, or even failed to deliver it when the plaintiff understood that it was virtually demanded according to the usage in such cases, and the plaintiff insisted upon making payment with the coupons which he himself had detached, the contract was broken by him, and he could not insist upon its performance by the company. The conductor had a right to put him off the train, and, upon his refusal to go, to use such force as was required to accomplish that result. In this view, according to the plaintiff's own version of what took place, the defendant might reasonably contend that it was in no wrong, at least up to the tender on the platform. The defendant was entitled to have the jury specially instructed upon the law applicable to such a state of facts. It was also entitled to a special instruction as to the law applicable to the alleged tender.

Upon examining the charge of the court, we find that it lays down the general principles regulating the liability of a railroad company, as a carrier, to a person on its train as a passenger, and the measure of damages for a wrongful eviction. But there is no charge whatever on the special facts of this case. The defendant requested his Honor to give certain special instructions to cover the omission, which he declined to do upon the ground that he had already given them in substance. We are unable to concur with his Honor

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in this respect. The charge is in substance that the plaintiff insists that he was wrongfully ejected, while the defendant contends that the plaintiff had violated the contract, and was ejected with no more force than was necessary, and if the jury shall find that plaintiff was wrongfully ejected, their verdict should be in his favor, but otherwise in favor of the defendant. It no where instructs the jury as to the effect of the failure or refusal of the plaintiff to show his ticket to the conductor, and of the tender of coupons detached by himself, where the contract between him and the company required such showing, and that the coupons should be detached by the conductor; nor the effect upon the measure of damages of what took place in the body of the car, upon the supposition, if the jury should so find, that the plaintiff had violated the contract, and that no more force was used than necessary to remove the plaintiff from the cars, he having refused to go. These were the objects of the first three special instructions. The defendant was entitled to have the jury instructed as to the law applicable to these facts, although not necessarily in the exact language of the instructions presented.

The fourth and last special instruction asked by the defendant is as follows: "If, however, you find that the plaintiff tendered the conductor his book on the platform, and did so in an insulting and boisterous manner, cursing the conductor at the time, and the conductor declined to accept the fare tendered in such manner, and ejected him, using no more force than necessary, then the plaintiff cannot recover."

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The court declined to so charge, but instructed the jury that it made no difference how the fare was tendered: "whether in a rude, or boisteous or insulting manner, the agent was bound to accept the fare, and you need not consider the manner of the plaintiff in tendering the fare."

If the plaintiff failed to pay his fare at the time, when, according to the regulations of the company, it should have been paid, and upon reasonable demand made therefor, he himself broke the contract, and could not insist upon its fulfillment. And the weight of authority is that, in such case, he cannot, by tendering the fare, when he is being put off, or upon re-entry after ejection, acquire a right to passage: *Thomp. on Carr.*, 340, where the cases are collected in a note. The right, it is said, to refuse to transport the plaintiff further, and to eject him from the train, would be an idle and useless exercise of legal authority, if the party who had hitherto refused to perform the contract by paying his fare when duly demanded, could immediately re-enter the cars and claim the fulfillment of the contract: *O'Brien v. Boston, etc., R. Co.*, 15 Gray, 20. If one passenger, it has been said, might by his unjustifiable conduct delay the train to put him off, another might do the same thing, and thus the utmost irregularity in the running of the train be produced, jeopardizing the safety of the company's property, and the lives of all on board: *Hibbard v. New York, etc., R. Co.*, 15 N. Y., 455; *State v. Campbell*, 32 N. J. L., 309; *Fulton v. Grand Trunk R. Co.*, 17 U. C., 428. The strict rule thus laid down ought, perhaps, to be

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confined to willful violations of contract upon proper demand. It would not apply, as we held in a recent case at Nashville, where the passenger went on board under an honest belief that he could pay his fare in a particular form, and was unable to pay in any other way, and a tender was made by a third person on his behalf while he was being ejected. Nor will it apply where there was an honest, although mistaken assertion of right, when the tender was made by the passenger himself while quietly submitting to the legal right of the company to eject him. But the rule would exist only in name if a passenger who had willfully violated his contract, and compelled the officer of the company to resort to force to remove him, were permitted to obtain the full benefit of the contract by a tardy and ungracious tender, made in a manner to disturb other passengers, and tending to a breach of the peace. A passenger is not entitled at any time to tender his fare in a rude, boisterous and insulting manner, although ordinarily the manner would not be permitted to invalidate the fact. He certainly has no such right when he is being lawfully ejected for a willful breach of contract. Of course, we do not mean to express any opinion on the facts of this case. It is the province of the jury to pass upon them, under a proper charge of the law.

The judgment must be reversed, and the cause remanded for a new trial.

DeArusmant v. DeLagerty.

F. SYLVA DEARUSMANT v. CLEMENCE DELAGERTY,
CHARLES PATTON, *et al.*

TRUSTEE AND CESTUI QUE TRUST. *Trust property.* A conveyed a tract of land to L by deed, acknowledged and registered, no lien retained. A by contract was to receive an annuity from L, and at his death to be paid a sum of money, which was to be a prior lien upon all his property. This contract was unregistered. L under a contract put P, his agent, in possession of the land. L left the country and P filed a bill against him as a non-resident for account, and the land was sold. S became the purchaser, and afterwards conveyed to P, who all the time was in possession. L died abroad, and his heirs commenced suit against P for the land, which was compromised by giving the heirs a part of the land. A files bill to enforce her contract. *Held*, she was entitled to have the land sold to pay her the amount due, both the land held by P and by the heirs. The agent could not, without notice, change the character of his possession so as to make it adverse. The heirs take the real estate subject to all burdens imposed upon the property.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. R.
J. MORGAN, Ch.

W. M. RANDOLPH for complainant.

T. W. BROWN, H. M. HILL and GEO. GILLHAM for
defendants.

FREEMAN, J., delivered the opinion of the court.

This case has been argued with much zeal and ability by counsel, and we proceed to give the result

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of our investigation of the facts as presented by the record. The original bill of complainant was filed on the 28th of March, 1874. Several amended bills were subsequently filed, which make up the ground of the relief sought. A short statement of facts will serve to present the questions for decision, on which the result must turn.

On the 9th of October, 1860, Eugene DeLagerty, in the State of Kentucky, entered into the following contract with complainant: "Know all men by these presents, that Eugene DeLagerty, of the State of Kentucky, in the United States of America, does hereby acknowledge himself indebted to Frances Sylva Philgrupal DeArusmant in the sum of fifty thousand dollars, for property sold to him by the said Frances Sylva P. DeArusmant; and the said Eugene DeLagerty hereby binds himself and his heirs, administrators and assigns, to pay the said Frances Sylva DeArusmant, or her assigns, the sum of five thousand dollars during each and every year of her natural life, said sum to be paid on the first day of November in each year; and it is distinctly understood and agreed by and between the said parties, that in case the said Eugene DeLagerty should die before the said Frances Sylva DeArusmant, then she and her heirs and assigns shall have a lien preferable and prior to all others, upon the estate, real, personal and mixed, of the said Eugene DeLagerty, for the payment of said sum of fifty thousand dollars, as well as for the payment of any portion of the said annuity which may then remain due and unpaid." This instrument was not

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registered at the time, nor until after the commencement of this suit, probably in 1878, not long before the final decree.

The complainant was, at this time, owner of a large tract of land in Shelby county, Tennessee, on the Memphis and Charleston Railroad, about twelve or fourteen miles from the city of Memphis. This land, probably fourteen hundred acres, was uncleared, with a large amount of valuable timber on it. On the 31st of January after this, 1861, complainant executed to DeLagerty a deed conveying this body of land to him, which deed was registered in Shelby county soon after its execution. This deed on its face expresses the consideration for it to have been thirty thousand dollars, to be paid by DeLagerty, the receipt whereof was acknowledged in the face of it. No lien was retained for the purchase money in said deed.

It is shown, however, pretty clearly, and is not seriously questioned in argument, that the price of this land made up a part of the consideration for the contract of date of October 9th, 1860—the other twenty thousand dollars being probably the consideration for certain mortgages on property in the city of Cincinnati, which were also transferred (or are said to have been) by complainant to said DeLagerty. Complainant at this time is shown to have resided in the family of DeLagerty, and had done so since 1858. He was a relative of Frances, was married and had several children—his mother being a woman of some wealth, and residing in the city of Paris, France. These transactions took place in the city of Covington,

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Kentucky, where the parties then resided. About this time DeLagerty seems to have conceived the design of sending his wife to Paris, with probably one of the children, and it is to be more than suspected, his purpose was to form a connection with complainant, to which, we take it, she was not averse. We need not go into the evidence in support of this suggestion, as it does not materially bear upon the solution of the legal questions on which the rights of the parties in this case depend. Suffice it to say, that his wife was sent to Paris, from which place she never returned to America, nor do we think it was desired or expected by either complainant or DeLagerty that she should ever do so, when she left.

Not long after the contract of October 9th, 1860, DeLagerty entered into the following contract with defendant, Charles Patton. "Doctor DeLagerty having a certain quantity of land in the vicinity of Memphis, Tennessee, commonly called the Neshoba tract, and being anxious to have the same cleared and put into suitable condition for farm or other purposes, has this day entered into the following contract with Charles Patton, to-wit: The said Charles Patton agrees to devote his undivided time and energies in carrying out the above intention according to instructions furnished him by said Dr. DeLagerty, and in consideration of the perfect performance of said work he is to receive in compensation twenty per cent. on the products sold off said land, viz., firewood, lumber and other farm products, after deducting expenses. All sales made on a credit will be at the risk of said Dr. DeLagerty.

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The above allowance of twenty per cent. is in consideration of Charles Patton remaining in the above employment until the whole work is performed, and in case he should desire to leave said employment at an earlier day and previous to the work being performed, then the above per centage will be reduced to ten per cent. The work will be considered done when the lots Nos. 1, 2, 5, 6, 7 on said tract, surveyed by W. E. Rucker, of Memphis, are sufficiently cleared for residences, and the bottom land lots, 1, 2, 3, 14 and 15, north of Wolf river, are cleared and disposed of, and the products sold.

Dr. DeLagerty will also furnish Charles Patton a house and garden lot for himself and family on the premises; furthermore, Charles Patton is to receive on account of his services, fifty dollars monthly, and at the expiration of each year the compliment of ten per cent. of the sales which have been made, the balance to be placed to his credit until a final settlement. This contract to commence on the 15th day of November, 1860."

In pursuance of this contract, Patton came down to Shelby county from Cincinnati—his family following soon after, and commenced operations—both parties evidently having most extravagant views as to the result of the contemplated establishment—the Frenchman, Dr. DeLagerty, going no doubt far beyond the cooler American in these anticipations. Miss DeArusmant came down with these parties; but the excitement incident to the opening scenes of the war, no doubt suggested to these parties that a return to the north was

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more in accord with their plans, and so they returned to Cincinnati, and from thence went to Philadelphia, and not long after were married in New Jersey—Miss DeArusmant insisting (and, we take it, she thinks truly) that she believed the wife had died after her return to Paris—Dr. DeLagerty having so informed her. That he believed this, we do not believe—except on the principle that we readily persuade ourselves of the truth of that which we desire to be true.

We may say here in passing, that it does not appear that Patton knew anything of the contract for the fifty thousand dollars, the annuity, or in fact anything definite of the plans of these people, whose notions of propriety were evidently outside the range of his experience. Complainant swears in her deposition he did know all their plans; but this is denied by Patton in his answer as well as in his deposition, and must be decided as not proven.

Complainant and DeLagerty remained in Philadelphia, or the neighborhood, in most straitened circumstances until probably 1867, when they went to Scotland, where she had an estate yielding, it seems, about two thousand dollars per annum. On this they lived for some time, when the property was sold, and they started to the continent, where at Sienna, in Italy, he died, 23d of December, 1873.

Before leaving Scotland, complainant concedes she was informed that the wife was not dead, as she professes to have believed, but this seems not in the least to have tended to relax her hold on the ill gotten husband.

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During all this time, Patton remained on the lands, holding for DeLagerty, carrying out, as far as we can see, the terms of his contract in good faith, as far as it could be done in view of the disturbed condition of the country. DeLagerty was expected to return in the spring, perhaps, when he left, but, as we have said, did not do so.

In this situation of things, after making inquiry by writing to parties intimate with DeLagerty as to his whereabouts, with no result, on the 15th of May, 1865, he filed his bill in the common law and chancery court at Memphis, stating the contract between them, the purchase of the land from complainant by DeLagerty, and adds, that he was not informed as to what consideration was paid Miss DeArusmant, but suggested that his best information and belief is, that she still retains in equity and in right an interest, though an exceedingly small and remote one, in said land, and should justly be regarded and treated as to some slight extent part owner thereof. She was, in view of this assumed interest, made at first party to this bill, but afterwards it was dismissed as to her, for reasons stated in the order. These statements of the bill are explained in the answer fully as follows: That the records of Shelby county had been removed from the State, and it was assumed that she might have retained some interest or right as to the land in the deed from her to DeLagerty. When access was had to these records, it was seen that she had no such interest therein appearing; and thereupon Patton

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dismissed his bill as to her, stating the above reasons substantially in the decree of dismissal.

This bill was based first on the theory that Patton had taken charge of the property as agent, under the written contract; that the contract had been kept by him, and that his services had been given, by which he had entitled himself to the compensation stipulated for, and proposes an account of the transactions between the parties.

In addition, there was a large claim made, based on the theory that DeLagerty had agreed to erect a saw-mill on the place, for sawing the timber into lumber for sale—was to furnish a hotel or station house at the railroad, and they were also to carry on a large brick-yard, together with perhaps other undertakings—from which it was contended by Patton, that he should receive at least \$5,000 per annum, and that he had been induced, in view of the performance of these verbal agreements, to break up his home in Cincinnati, and settle on the land; but that DeLagerty had failed to do any of the things agreed, and had left the United States, with no effort on his part to perform his contract, and so he claimed he was entitled to recover on this score. He filed with his bill his account as agent itemized, showing what he claimed was the state of the account between them; and then an item for the profits promised by the assumed verbal contract, to-wit, profits on brick-yard, saw mill, and sales of all kinds of produce from the Neshoba farm, which amounts to \$25,000. He credits DeLagerty with moneys received from a note sent him to collect,

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with proceeds of cord-wood, cotton and other things, to the amount of \$4,203.58; and for balance claimed to be due, he seeks a decree against DeLagerty, and has an attachment against the Neshoba lands, on the ground that he was a non-resident.

We need not go through the history of this case, further than to say, it proceeded to a decree by regular stages, after a publication as to DeLagerty, and the land was ordered to be sold, and was sold by the clerk and master on the 15th of October, 1866, when Nelson Speers became the purchaser, by his agent, a son, who it seems resided on the place, at the sum of \$21,335, giving his notes due at six and twelve months, for the price. On the 8th of December, 1866, this report of the clerk and master was acted on, and the sale confirmed, the title divested out of DeLagerty and vested in the purchaser, and he ordered to be put in possession of the same, a lien being retained for payment of the purchase money.

The matter thus stood, until February, 1867, when the clerk reported that the costs had been paid, \$351. He further reported, that Charles Patton, for whose benefit the sale was made, had offered to take the notes of Speers, the purchaser of the land, for their full amount, and receipt for the same as so much paid on his decree, which was recommended to be accepted. Which report was confirmed and approved by the court in March, and a final decree entered, satisfying Patton's debt, and again formally vesting the title in Speers, the purchaser, and a judgment was rendered over against DeLagerty for the balance of his debt ascer-

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tained in the original decree. In this decree, however, a lien is expressly retained in favor of Patton, for payment of the notes by him received.

Under this decree Speers claimed title to the land, Patton claiming to occupy it under him and hold for him, till the spring of 1874 (March 8th, 1874) when Speers conveyed it to Patton by a quit claim deed, from which time he held for himself, as he says. The bill in this case was filed soon after this conveyance, March 28th, 1874.

This bill goes on the theory, first, that complainant is for some cause entitled to have the deed made by her to DeLagerty cancelled, and the sale to Speers declared void, and the conveyance to Patton also declared void, and title revested in her. We need but say, there is no ground on which she can claim title to the land.

The alternative relief, however, is sought that she shall be entitled to charge upon the land, by virtue of the contract of October 9th, 1860, as the consideration of the conveyance of January, 1861, the fifty thousand dollars. We need but say, that only thirty thousand dollars is pretended to have been the consideration of that conveyance; no lien is retained on the land, the contract was not registered, and no notice of the lien or preference therein brought home to Patton, and if he is not affected by other equities, then no lien can be enforced as a vendor's lien against the land in his hands.

The next alternative relief sought by the bill is on the theory that she is a creditor of DeLagerty, by

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virtue of the contract of October 9th, 1860, and is entitled to charge the land with the sum therein specified, and have a preference by its terms on all his estate.

The main question, we take it, in this case is, whether as such creditor, she is entitled to charge the lands, and appropriate them, either in the hands of the heirs, to whom five hundred acres were decreed in a compromise decree, or in the hands of Patton, as holding under Speers, and he under the decree made for sale of the land in the case of *Patton v. DeLagerty*, which we have referred to.

Several grounds are presented and urged with much ability in favor of this relief, as against the entire lands, some of which we notice.

The bill and amended bill simply attack the sale of Patton, obtained under the decree, on the ground that it was void for want of proper publication, as required by law in order to bring DeLagerty before the court; and then because, on the facts charged, of the relationship between Patton and DeLagerty, the claim presented in his bill, and the whole proceeding, was fraudulent as to DeLagerty, and so Patton holds the property subject to the rights of the creditor of DeLagerty, as having fraudulently, through the agency of a suit in chancery, obtained the legal title to himself.

In addition it is charged that when DeLagerty left the land in January or February, 1861, to go to Kentucky, Patton was left in possession of the land and in charge of it, to take care of it, occupy and pro-

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tect the rights and interests of DeLagerty and also of complainant, during their absence. So far as any undertaking for complainant is concerned, we need but say here, the proof fails to make out the case.

We need not discuss all the various questions argued by counsel.

Whether Patton's decree was valid or invalid, the statute of limitations would be a bar to any assertion of the right of complainant as a creditor of DeLagerty, as it would be to DeLagerty had he sued himself—provided he is not precluded from insisting on the lapse of time by other considerations. But the real question is, could Patton, under the facts in this case, set up title under the statute, or was he, by reason of the relations between him and DeLagerty, as tenant, or agent in possession of the lands, precluded from purchasing or asserting a title to the same in the way it was done?

We have had some difficulty in reaching a conclusion on this question. The principle is one of unquestioned soundness, as held by this court in the case of *Armstrong v. Campbell*, 3 Yer., 201, that a trustee or party having control or charge of property charged with a trust for another, such an agent, or attorney in fact, cannot by any act of his own, without communication with the *cestui que trust*, so change the character of his possession as to make it adverse; and even if he sell the property or part with it in any way to one in whose favor time would run, and afterwards regain the property by purchase or descent,

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he shall hold it incumbered with the trust. See also, *McDonald v. McDonald*, 8 Yer., 149; 10 Yer., 104.

The case in 3 Yerger was this: Campbell, as attorney at law and in fact, agreed to attend to the business of Armstrong with reference to certain lands granted to him and Dougherty in Tennessee. Campbell undertook to ascertain the locality of the lands, and sell Armstrong's half to the best advantage, and was to receive one-third of Armstrong's one-half of the lands, as compensation, or one-third of the money for which he might sell them. Campbell sold part of the lands to Trimble, for his own profit in fact, and received a reconveyance from Trimble. This court held that the original trust being by contract, that when Campbell obtained title to the lands again the trust continued fastened upon them in his hands, and Armstrong was entitled to have them. The principle is, that the parties still occupied precisely the same relation to each other as before the sale and purchase—the one as principal, the other as agent—there having been no notice of any adverse or antagonistic holding on the part of the trustee.

The question is, was Patton in possession of the lands by contract as agent, holding the same for DeLagerty, having charge and control of them, and bound to protect the title?

As to the written contract, it may well be doubted whether it furnishes clear evidence of such relation; but Patton, in his deposition, swears definitely, that when DeLagerty left the place in January or February, 1861, to go to Kentucky, that he left him in

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charge of the land, and that he held up to the entire boundaries of the land, it having been lately surveyed and a map made of the same, which was in his possession. He further swears he was holding it for DeLagerty, and he so continued to hold until the sale under the chancery decree, when he began to hold for Speers, the purchaser, and then in 1867, when reconveyed to him by Speers, he held for himself under that conveyance. This is the clear and definite result of the proof as made by himself.

We have the case, then, of a party left in charge of and in possession of land by the owner, who procures the same to be sold, on a claim which we can see was in the larger part groundless of legal right, and then regains the title in payment of his assumed debt. Unquestionably he must be held on this aspect, as in possession as of the old contract, and holding charged with the same trusts in favor of the party for whom he held before the sale and purchase by him. We think this is all clear, and needs no further argument to support it.

But a question of no little difficulty is now presented, arising out of the following state of facts:

In 1871, long after Patton had purchased and was in possession of the land, the heirs of DeLagerty commenced and prosecuted a suit in the chancery court, to recover this land, alleging the invalidity of the whole proceeding, and seeking to have it annulled. This suit proceeded regularly until there was a compromise decree made, in all things formal and regular, by which the court decreed five hundred acres of the

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land to the heirs of DeLagerty, and the balance to Patton. What shall be the effect of this on complainant's rights as a creditor of DeLagerty, with a general lien on all his property, real and personal, as between him and her, after his death—not one fixed before and at the time of the contract—but one contracted to arise on his death? This is the sole claim of complainant, and she can stand on nothing else.

It is to be remarked in discussing this question, that complainant's lien, as per her contract, is not a specific lien on any particular property, but is only "a lien preferable and prior to all others, upon all the estate, real, personal and mixed, of the said DeLagerty," at his death—he dying before complainant.

Is she not, by the terms of the contract, confined to the property rights he may have actually had, and can she assert any above him, as against any party who had an adverse claim over him, and stronger than his?

It may be assumed that she was confined in the assertion of her lien, to the property which he actually owned at his death. But then she was no party to the proceedings between DeLagerty's heirs and Patton, and her rights attached on the death of DeLagerty and overrode the rights of the heirs by descent, being by contract with their ancestor, so that they took subordinate to her right. This being so, her right was independent of and separate from the title of the heirs, and stands unaffected by the compromise decree.

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It follows, that the complainant is entitled to enforce her lien as against the land in his hands, and it will be so decreed.

The only other question is, as to whether this claim is superior to the claim of the heirs of DeLagerty? Without discussing the question, we hold that it is. They take the shoes of their ancestor, take subject to all legal burdens imposed on the property by him, and therefore cannot resist the lien of complainant, time not having created the bar of any statute of limitations in their favor.

A decree will be drawn in accord with this opinion, enforcing the lien of complainant by sale of the land in controversy. The clerk of this court will make the sale, selling in such parcels as may be deemed best, under the direction of complainant's counsel, or as at present laid off. No account or other matter growing out of occupation of the land by Patton, or other equity, is before us on this record, therefore nothing decreed in these matters.

Costs paid out of the fund.

Edwards v. Boyd.

EDWARDS and WIFE v. WM. BOYD, and BOYD v. EDWARDS and WIFE.

MARRIED WOMEN. *Mortgage. Husband agent of creditor. When. Where* the husband procures his wife's conveyance to homestead, or to her lands, to secure a pre-existing debt of his, he will be regarded as the agent of the creditor, who will be bound by the husband's actions.

FROM WEAKLEY.

Appeal from the Chancery Court at Dresden. JOHN SOMERS, Ch.

C. M. EWING and N. N. EDWARDS for Edwards.

H. H. BARR and M. D. CARDWELL for Boyd.

FREEMAN, J., delivered the opinion of the court.

The contest in this case is over the question, whether the wife of Edwards has released her homestead right in seventy-five acres of land on which the family resided, by the privy acknowledgment of a deed of trust in favor of defendant Boyd, and made to him to secure a pre-existent debt due him from the husband.

The bill goes on two propositions. First, that the signature and privy acknowledgment of the wife was obtained by fraud and under a collusive arrangement between the husband and said Boyd, by which the wife was to be made believe she was signing deeds for two other tracts of land sold to Boyd, and the

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fact that she was signing a conveyance of her homestead concealed from her.

We need but say, that while there are some suspicious circumstances shown tending to support this theory, yet it is positively proven alone by the testimony of the husband, and is with equal emphasis disproved by Boyd, and as they are the only parties who probably know the facts of the transaction, the proof is pretty equally balanced, and complainant fails to make out her case.

The other ground is, that the wife did not know the contents of the paper signed, and signed it against her will, and not freely, voluntarily and understandingly, as required by our statute.

This case differs from the case of *Shields v. Netherland*, 5 Lea, 197-8, in that, the conveyance was not made for a valuable consideration then advanced on the faith of it, and also, in that case, the husband who procured the signature of the wife, was clearly not, acting as the agent of the creditor, but was acting for himself, in procuring the wife's signature to the deed.

In this case it clearly appears that the conveyance and signature by the wife, was to secure a pre-existent debt to Boyd. That the husband was in failing circumstances, and Boyd had a mortgage on lands, to which the wife was not a party, and had discharged a mortgage to Brasfield of about \$800, in order to free the land in favor of his own debt, and was very anxious to have himself secured and re-imbursed for money thus expended.

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It is further shown, both by the husband and by Boyd himself, that it was agreed between himself and the husband, that the husband should procure the wife's signature to the deed for the homestead, in order to secure the debt mentioned. It is certain that her signature was obtained by the husband in pursuance of this agreement.

This brings the case within the principle stated by Judge Cooper, 5 Lea, 199, that "if the husband could be considered as the agent of the trust creditor, or conveyee, for the purpose of procuring the wife's conveyance, as where the creditor is seeking to obtain a mortgage on the wife's land for the security of a pre-existing debt of the husband, the creditor might be bound by the husband's action," citing *Central Bank v. Copeland*, 18 Md., 305. The husband in this case, was charged with having fraudulently procured the signature, and the above rule stated as the correct one in the case supposed.

This rule is a sound one, for in such case, the creditor is making a contract with the wife, in which she is required to act freely, voluntarily, and without compulsion or restraint, in order to effectuate the conveyance. She is releasing a property-right to him for his benefit, to secure the debt of her husband, it is true, but it is not her own, nor is her property liable for it, nor was it contracted on the faith of such liability. In good faith, and of necessity, he is compelled to trade with her, either by himself or an agent, as negotiation and mutual agreement as to terms are essential elements in a contract of this kind as well as

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others. In one of such delicacy as this, guarded by our law with such care, and subject to so much abuse in case of husbands distressed and harrassed by debt, perfect fairness—at any rate, common prudence would demand that the creditor himself (where it can be done), should, in a case like this, see the wife, and know that she assents to the contract he is making with her. He must either do this or communicate with her by some other means, and if he chooses the husband as that means of communication, he must, in common fairness, do so at the peril of being responsible for his conduct of the business, as in other cases of agency. Such is the principle announced, and it is one well sustained by reason, authority and the nature of the transaction.

The weight of the proof is, that the wife did not know the character of the instrument she signed. She and her husband swear it most positively—and the commissioner, and his wife, who was present at the privy examination, agree that the deed was not read over to her. There are some efforts made to show that she afterwards spoke of having signed such a paper, or knew that such a deed was held by Boyd. These apparent contradictions are doubtfully made out, and not being clearly shown, belonging to a class of testimony characteristically weak, that is, a recital of casual conversation by witnesses years after they occurred, cannot overturn the positive swearing of unimpeached witnesses, howbeit, they are interested as parties to the cause.

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In addition, there are circumstances tending to indicate that she would not have willingly signed the deed for her homestead. The husband was being broken up and his property swept away in payment of debts incurred, as partner and surety for another. She well may be justified in saying that she was opposed to signing even the other deeds to pay Underwood's debts and therefore, would have been more opposed to signing one conveying the last of his land, including their home.

But it is clearly shown, both by the husband and wife, that when called on to acknowledge privily the papers, she promptly responded that she could not do it willingly—or freely and voluntarily—and in addition, the same is proven by the commissioner and his wife.

The facts shown by these witnesses, about which there is no dispute is, that at first she refused to sign, told the commissioner she did not do it willingly or fully of her own accord, and this was made so emphatic, as he says, that he said to her she could not sign them at all, and put them back in his desk, afterwards she said to him she reckoned she would have it to do anyhow, and had as well do it then as at any other time, and thereupon he read over the certificate, and she signed the deed by making her mark and he witnessed it. He says, that she told him she could not sign it voluntarily, but that she had been overpersuaded by her husband, and among other things, said he had been talking to her about it all day—it being then the afternoon—about two or three o'clock.

The chancellor held, that she did not understand

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the instrument signed, and therefore did not acknowledge it understandingly, and that she did not sign it freely, voluntarily and without restraint, and therefore decreed it void as to her homestead right.

The question is whether this is correct on the above facts. Upon careful reflection, we conclude the chancellor was correct. The husband being the agent of the defendant, so far as procuring the signature and assent of the wife, is concerned, must be held bound by the acts and conduct of the husband. The weight of the proof shows very satisfactorily that the husband concealed, or did not reveal the character of the deed she was signing, and that she was procured to sign it, without knowing its contents, and this end was sought by him. It further appears by the witnesses of the defendant himself, that the deed was not read over to her when signed and privily acknowledged.

We hold these facts constitute a fraud on the wife, and render invalid her act as against the attack made in the bill.

The result is, the decree of the chancellor is affirmed with costs.

Carter v. Young.

CARTER BROS. & CO. v. W. F. & R. T. YOUNG & Co. *et al.*

SURETIES. *Administrator's bond.* Testator directed, among other things, that his executors take an inventory of his mercantile establishment, and open a new firm for the benefit of his children, and run the same until youngest child is of age. If the house fails to show a dividend, then the executors might suspend until they shall think it to the interest of the minors to renew said business. They proceeded to administer the estate and opened the new business house, which afterwards contracted debts to insolvency. Suits were brought for debts of the business house against executors and the sureties upon their bond. *Held*, sureties were not liable. They were only liable for matters of administration covered by the bond of the executors as such, and not liable for failure of executors to discharge the trusts imposed by the will.

FROM DECATUR.

Appeal from the Chancery Court at Decaturville.
GEO. H. NIXON, Ch.

J. M. PORTERFIELD for complainants.

WOODS & TAYLOR, LOGAN & HAWKINS and PITTS
& CUNNINGHAM for defendants.

FREEMAN, J., delivered the opinion of the court.

The only question before us on this appeal is, whether the sureties on the bond of the executors, given on probate of the will of R. Young, deceased, by the executors appointed under said will, are liable for the debt of complainants in the original and amended bills.

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The bond is, in the general terms, provided for by our Code, the liability, conditioned on the fact that the named executors "shall well and truly, as such executors, perform all the duties which are, or may be enjoined on them, by law."

A short statement of facts will present the basis for solution of the question presented. Testator seems to have lived on a farm, with his family, and had a mercantile house in the town of Decaturville. He made his will in 1878. By the first clause of which, he provided for the payment of all the debts he owed, with his funeral expenses, out of the monies that I may die possessed of, or that might first come into the hands of his executors (except debts against my business house in Decaturville).

In second clause he provided for the payment of any debts against the business house out of cotton at the different gins, as soon as a sufficient amount could be ginned and sold to pay said debts.

After this he directed "an invoice of the business of the business house, and a true inventory rendered of the same—then the name of the old firm to cease, and to open in the name, firm and style of W. F. & R. T. Young & Co., and that the business continue, invoicing once every year, until the youngest child of mine living, arrives at the age of twenty-one, or till the house fails to show a dividend sufficient to be to the interest of the minor heirs, then the business to suspend till my executors shall think it would be to the interest of said minors to renew said business."

He then proceeds to give directions as to details

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in carrying on the business. In seventh clause he directs that his farming be carried on, the stock and implements to be used for that purpose, except a mower or reaper, which was to be sold, and the proceeds of farm to go for benefit and support of his wife and children, naming them. In another clause he directs that if a surplus on the farm shall be produced, it shall be sold, and proceeds received by the business house, and passed to the credit of the farm, and be applied to the family if needed.

W. F. and R. T. Young and John P. Raines were appointed executors, and also requested to act as guardians for the minor heirs, of whom he seems to have had several.

The executors seem to have settled up all indebtedness, took the inventory as required, and found assets in the business house at Decaturville—consisting of stock on hand, notes, accounts and monies, amounting to near \$4000—whereupon they opened in the new firm name as provided for in the will, and proceeded to business. This business seems to have been so imprudently conducted from 1879 to 1881, that the firm failed, and found an indebtedness against it charged, to amount to nearly \$16000, of which the debt of complainant in this bill is part.

The theory of this bill is, that the executors, in carrying on this business, were in execution of the will, and have been guilty of a *devastavit*, or misuse of the funds of the estate employed in the business, have allowed members of the firm recklessly and wrongfully to use the assets, etc., and the question now

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before us is whether the sureties on the bond are responsible for the debts incurred in the business by reason of the improper use of the assets dedicated by testator to the business.

There are other questions of interest raised, or attempted to be raised, by the bill, as between the creditor and other parties, such as whether the whole estate of the testator might, in any way, be held liable for the debts that might be incurred in carrying on the business provided for in the will, or only the assets that legitimately belonged to the business and went into it, and were dedicated to this purpose by testator. Upon these questions, we cannot rightly decide, as they are not yet before us. The chancellor dismissed the bill as to the sureties on the bond, from which there was an appeal. We but suggest that the questions raised mentioned above, will be found discussed in the case of *Morrow v. Morrow*, 2 Tenn. Ch. R., 549, in an exhaustive review of the authorities.

We think the principle stated in that case, as the proper construction of a will like the one before us, is correct, that is, that in legal effect, it is a legacy to the testator's executors of the property or business in trust, to be carried on for the benefit of the family as provided for. The objects of the trust, as well as the trust fund in this case, being well defined.

Since the cases of *Drane v. Bayliss*, 1 Hum., 173-4, and *Hughlett v. Hughlett*, 5 Hum., 452-3, it has been uniformly held, that the sureties on the bond were only responsible for the performance of the executorial duties as such as defined by law, such as the collec-

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tion of the personal assets, the faithful appropriation to the payment of the debts or legacies, and a proper account of them to the party entitled. That in case of a trust like the one now under consideration, the proper administration of the same devolved on the executors, if they were willing to assume them, as trustees, and for their proper performance they were to be held responsible in a court of chancery, but that these duties and trusts were not matters cognizable by the probate court, or matters of administration covered by the bond of the executors as such.

This having been so long settled, we do not deem it necessary again to review the principles on which it rests. Suffice it to say, it is well settled law.

The result is, the chancellor ruled correctly, that the sureties on the executors' bond were not responsible for the debts of complainants, nor the conduct of the trustees or executors in carrying on the business provided for by the will, and his decree will be affirmed with costs.

Mt. Carmel Church v. Journey.

MT. CARMEL CHURCH use of BROYLES & TATUM v. JNO.

F. JOURNEY, Adm'r. of HUGH NANCE.

PLEADINGS AND PRACTICE. *Parties. Assignee.* A subscription was authorized to Mt. Carmel Church, to be paid when the building committee required the money. The subscription was assigned to contractors and suit brought before a justice of the peace in the name of Mt. Carmel Church for the use of the assignees, and judgment for plaintiffs. *Held*, that the subscription was a promise to pay the building committee, and suit should have been brought in the name of the building committee, to use of assignees, but under sec. 4124 of the Code, the judgment being for the benefit of the assignees, who have the beneficial interest and are the real parties.

FROM HARDIN.

Appeal in error from the Circuit Court of Hardin county. T. P. BATEMAN, J.

PITTS & CUNNINGHAM for Journey.

L. H. & D. W. BROYLES for Broyles & Tatum.

DEADERICK, C. J., delivered the opinion of the court.

Nance authorized a subscription of \$25 in shingles to be charged to him towards building a church at or near Mt. Carmel Church. The heading of the subscription was reduced to writing, after the subscriptions were authorized, by J. A. Pitts, who wrote it out in conformity to the agreement and in pursuance of his implied authority to do so. It bound the subscribers to pay the amount annexed to their names, to build

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a church at, or near the site of Mt. Carmel Church. "The subscription to be paid whenever the building committee requires the money. A building committee was appointed and the church was built, and this committee transferred several subscriptions, amongst them that of Nance to Broyles & Tatum, for lumber purchased for the church." They brought suit and obtained judgment before a magistrate, from which Nance appealed to the circuit court. While the suit was pending there Nance died, and it was revived against his administrator. Judgment was rendered in circuit court in favor of plaintiffs, and the administrator has appealed to this court.

It was objected in the circuit court that there was no promise to pay any one, much less "Mt. Carmel Church," and no suit could be maintained in the name of Mt. Carmel Church. The paper shown does contain a promise to pay whenever the "building committee requires the money." And we think this fairly implies a promise to pay the money to the building committee, and that regularly, the suit should have been brought in the names of the building committee for the use of the parties to whom the claim was assigned.

The record shows that a building committee was appointed, and that they transferred the claim on Nance to Broyles & Tatum. The court refused to instruct the jury as requested, that the suit could not be maintained in the name of "Mt. Carmel Church" for the use of Broyles & Tatum, but said that if the facts showed plaintiffs were entitled to recover, they might,

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under sec. 4124 of the Code, if the parties entitled to relief as well as those whose rights are affected, are properly before the court, and it is sufficient if plaintiffs show an equitable right to recover, and the use of the name of "Mt. Carmel Church," would not affect their rights.

The section of the Code cited (4124), authorizes any justice of the peace where the subject-matter does not exceed fifty dollars, to hear and determine the cause, upon principles of equity, and render such judgment or decree as the merits of the case may require, as fully, and in the same manner, as courts of chancery. In this case the assignees who have the beneficial interest in their claim sued on, are the real parties, and the judgment is for their benefit. The facts showing their interest and title appear in the evidence, the claim belongs to them and the judgment reaches the justice and merits of the case.

It is not objected that Nance, after the subscription was made, and lumber bought, and preparations to build begun, notified the building committee that he would not pay his subscription unless the title to the site was obtained before further expense was incurred.

Upon this point the circuit judge instructed the jury that if no such condition was annexed to the subscription when made, it could not be afterward insisted on. It appeared that the land had been the site of a church for forty years, and that the tract of land of which it was a part, had been sold for debt, after the owner had promised to make a deed. We think there was no error in this instruction.

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It is next objected that the subscription being payable in shingles, no action could be maintained, unless notice or demand is given or made under secs. 1790, 1791, of the Code. Notice would be required as claimed. But in this case it appears the payor, himself, informed the building committee, that the man he had employed to make the shingles had disappointed him, and that he would not be able to furnish them, and they must procure them elsewhere. This, we think, is a waiver of the notice required, and dispenses with the necessity of giving it.

Upon the whole, we are of opinion that the merits of the case have been reached, and the judgment will be affirmed.

THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY
v. STATE OF TENNESSEE.

EXPRESS COMPANY. *Railroads. Privilege tax.* A railroad company which organizes an express company and carries on a regular express business as a part of the business of the railroad company, under the management and control of its officers, and by its own agents, is subject to pay a privilege tax imposed by statute upon express companies.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

Railroad v. The State.

W. G. WEATHERFORD and MORGAN & MCFARLAND
for Railroad Company.

S. D. WEAKLEY, Jr., and ATTORNEY GENERAL LEA
for the State.

FREEMAN, J., delivered the opinion of the court.

This case presents the question whether a railroad company, having an office, or offices in this State, is liable to pay a privilege tax, as an express company, where it organizes an express department, and carries on a regular express business, the same being conducted as a part of the business of the company, and under the management and control of its officers, and by its own agents.

The agreed facts show that early in the year 1880, the Memphis & Little Rock Railroad Company, organized and put in operation the express business over their road, and sending packages on beyond their own lines by express agency, in fact, proposed to do, as a company, the ordinary and well known business of an express company. The company gave public notice of this fact, and invited the public to give them their patronage in this business.

The taxes sought to be enforced are claimed to be due under the Code, sec. 553, sub-sec. 31, "all express companies, doing business in the State of Tennessee, shall take out license from the comptroller, and pay over to him one thousand dollars for the privilege of doing business, and in addition, give bond to pay over one-half of one per cent on their income

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from business done in this State." There are modifications in another section as to amount, but they are not important in the discussion of the questions before us. The acts of 1881, are of similar import and language, varying the amount of the tax: See Act 1881, pages 256 and 201.

The language of these acts, in designating what is to be taxed as a privilege under them is, the occupations and transactions that shall be deemed privileges, and be taxed, and not pursued without license are the following—enumerating them—among them, as we have seen, is express companies doing business in the State, etc.

The first question is, whether this language includes the railroad company, or the express business rather, carried on by such company in this State. We think beyond question it does. The purpose of the statutes is to tax the occupations and transactions mentioned. That the railroad company, nominally is engaged in the occupation, and engaged in the transaction of express business, is not questioned. The fact that the business is being conducted under the management of railroad officials, and by agents of railroads, can make no difference. They are not taxed for their privilege of doing a public business in our State, as common carriers. Why they might not be, however, we cannot see, as in this case, it is but an artificial citizen, so to speak, created by another State, and certainly cannot claim fairly, unless protected by contract or some other way, higher rights than natural citizens.

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The fact is, this is but an express company, so far as this business is concerned, and is, as we have said, a railroad company that is also doing an express business, therefore an express company, so far as this occupation and these transactions are concerned.

Suppose this company should establish a banking house in one of our cities, and carry it on under the direction of its officials, and by agents appointed by the company. No one would seriously insist that such bank would be exempt from taxation as a banking company.

The real question is, are the legitimate functions of a railroad, and the express business identical, or are they distinct occupations and transactions, when considered as occupations, or businesses?

We do not deem it necessary to go into the cases, contradictory as they are, involving a contest in England between private carriers, and railroad companies, and in the United States, between express companies and railroad companies. A review of these cases will be found in *American Law Reg.*, vol. 20, 591, *et seq.* It suffices to say, that both in fact, and on authority, we think it clear the two businesses are separate and distinct, having many likenesses, it is true, but differences so well marked, as to make them clearly distinguishable the one from the other.

We shall not undertake to enumerate the points of likeness or difference in this opinion. It suffices to say, the express company and express business may be conducted without the aid of a railroad at all, while the business of the railroad involves of necessity the

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use of track, trains and all the complicate machinery included in the idea of the railroad business—a thing that may exist, or a business that may be carried on independent of, and without any connection with another thing or business, cannot be a necessary part of that other thing or business. This would be to assume that a thing or business could exist or be carried on without its necessary parts, or doing the business for which it is adapted and designed.

It is but just that this shall be the construction to be given our acts of assembly. Otherwise a company or individual engaged in the express business solely might be burdened, and would be burdened with taxes, while another company or individual organized, as in this case, in another jurisdiction, and existent then, under a different name, could establish its agencies here, and by calling its occupation a department of its other business, be allowed to enter fully into competition with the regular business, and pay no taxes at all.

It is not the name by which a business shall be called, nor agencies by which controlled, nor the fact that it may be connected with another and different business, that makes the occupation taxable—but the actual character of the occupation or business transacted. There can be no question that the occupation here, and the business done, is that of an express company, and as such, we have no doubt it is subject to be taxed for the exercise of the privilege, under our laws.

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Without going into an extended discussion of the questions so ably argued by counsel, we have no doubt of the correctness of the conclusions above announced, and affirm the judgment of the court below, with costs.

L. & N. R. R. Co. v. MILAM Ex'r.

RAILROADS. *Speed of trains.* It was error to charge that if the train was running at such a speed that it could not be stopped within the distance the head-light would discover objects upon the said road, the jury might find the company guilty of recklessness, notwithstanding all the prescribed precautions were observed. There is no law prescribing the rate of speed at which trains should run. The question of recklessness or excessive speed is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by aid of the head-light.

FROM HENRY.

Appeal in error from the Circuit Court of Henry county. FITZGERALD WILLIAMS, Sp. J.

COLE & SWEENEY for Railroad.

T. C. FRYER for Milam.

FREEMAN, J., delivered the opinion of the court.

This is an action brought to recover damages for killing four mules by a freight train on defendant's road. The defendant plead not guilty, and a special

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plea in confession and avoidance. in which it is admitted the mules were killed, but it is averred "that the killing could not be avoided, because the agents of defendant did all they could, or that was in their power to do, and everything that could be done to avoid the killing that is required by law."

On these issues the case was submitted to a jury, who found for plaintiff the value of the stock.

The facts, as presented by plaintiff, showed that the mules were grazing near the road, at about 9 o'clock at night, at a point above they might have been seen in daylight, at least six hundred yards—it being a level grade—just at the end of a steep grade over which the cars had come. It is shown that the mules started at the approach of the train, and ran down the side of the track, near the end of the cross-ties, for eighty yards, and then jumped on the track, and the two youngest ran one hundred yards, before being struck, the two older and stronger, some fifteen or twenty yards further. The proof of plaintiff is, that from the appearance of the tracks, they were probably running at a rate of ten to fifteen miles per hour, and as there was a fence on one side of them, compelling them to run near the track, we assume they naturally ran at about their best speed. The plaintiff's proof tended to show that the train was running at an unusually rapid speed, while the testimony of the engineer and employes of the road is, that it was running at only the rate of from ten to twelve miles per hour—fifteen being the limit prescribed by the company for freight trains at that time.

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The engineer on the train at the time, says he was on the lookout, and only saw the mules when they jumped on the track about twenty feet ahead of the engine, and that he immediately whistled down brakes, gave the cattle alarm and reversed his engine—in fact, did everything to prevent the accident—and that the train could have been stopped at one hundred and fifty yards.

It is evident from these facts, that the verdict of the jury is well warranted on the ground of negligence, as it is certain that if there had been a proper look out, as required, the mules could have been seen, as they ran eighty yards down the side of the track, and were thus, under our decision, an obstruction appearing on the track, though not literally upon the road-bed. It is equally evident, that if they had been seen thus running, the speed of the train could have been checked, so that at the rate the mules were running, they would certainly have escaped—taken in connection with the theory of the defense in proof, that the train was slackened in speed by climbing the steep grade just passed over.

On this view of the case, it is clear there should be no reversal, unless the law has been charged erroneously in a material matter bearing on the state of facts shown in the proof, so that the jury might have been misled.

The only point on which his Honor's charge seems fairly subject to criticism, is in reference to the rate of speed at which the train was running. Plaintiff's proof tended to show that it was from twenty-five to

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to thirty-five miles per hour—the defendants, as we have said, from ten to twelve.

His Honor stated to the jury, after giving the assumed facts, that if at the rate of speed said train was running, it could not have been stopped within the distance at which the head-light upon the locomotive would discover objects upon the road, or obstructions upon the track, and you should be of opinion from these facts, that defendants were guilty of recklessness in so running, the defendants would be liable, notwithstanding all the prescribed precautions were observed.

We have said, in several cases, that there was no law prescribing the rate of speed at which trains should be run, either freight or passenger. Nevertheless, it is evident there may be cases in which the speed taken in connection with the other circumstances existent at the time, may be an element of inquiry, on the question of negligence in the use of machinery of such tremendous power for mischief, by the parties having it under control. Independent of our statutory regulations, the principle applicable to this question is, that the company must so enjoy their own rights, as that the rights of others shall not be infringed, nor injury done to person or property. When this can be avoided by the exercise of the utmost prudence and care.

Our statutory regulations but embody this principle, and it underlies them all. The principle applicable to this question is stated with reasonable accuracy by the Court of Appeals of New York, in the case of

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Massoth v. Delaware and Hudson Canal Company, 64 N. Y., 531, that "where there is no statutory regulations fixing the rate of speed of trains, it is a question of fact, whether the rate of speed was excessive or dangerous in that locality, and if so found by the jury, and such excessive rate caused the injury, the road would be liable for the damages." See also, *Wilds v. H. R. R. Company*, 29 N. Y.

His Honor, the circuit judge, has left it to the jury to say, whether the speed being such as that the train could not be stopped within the distance the head-light would discover objects ahead, or obstructions on the track, was not recklessness on the part of the defendant, notwithstanding all the precautions required by the statute were observed. In this, we think he erred, as the fact that the train could not be stopped within the distance mentioned, is not the true test of over speed, or recklessness—nor one from which a jury could be authorized to infer the fact of recklessness. The question of reckless or excessive speed, is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by the aid of the head light.

The instruction asked by the defendant was equally objectionable, however, as it went on the assumption that the speed might at all times be such as the company might deem proper to meet the wants of commerce. This would leave railroad commissioners independent of all restraint or rule, and to be governed solely by their own judgment, regardless of danger to

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persons or property. No such rule can ever be sound.

For the error indicated in the charge, the judgment must be reversed and case remanded.

KIRKWOOD v. SMITH, Adm'r.

JUSTICE OF THE PEACE. *Authorizing constable to sign warrant.* A justice of the peace cannot authorize a constable to fill up a warrant and sign his name in his absence. The signing of the warrant is an official act which cannot be done by power of attorney.

FROM HENRY.

Appeal from the Chancery Court at Paris. John Somers, Ch.

T. C. FRYER and S. A. CHAMPION for complainant.

J. N. THOMASON for defendant.

FREEMAN, J., delivered the opinion of the court.

This bill is filed to enjoin a suit at law, and have the matter investigated in a court of chancery, after there had been several trials at law, and an appeal pending in this court. The defendant, on the filing of this bill, moved the chancellor to compel the complainant to elect in which court he would proceed.

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He elected to dismiss his appeal, and proceed with the case in the chancery court.

The case, on the facts is, that notes of the complainant, Kirkwood, were placed in the hands of one Baker, a constable, for collection. He went to see a justice of the peace with the purpose of getting a summons for defendant—met the magistrate back of his field—showed him the notes and told him he wanted a warrant. The magistrate said he had no blanks, nor pen or paper, and so could not issue one. He however told the constable to go on and fill one out and sign his name to it, and he would endorse what he did.

The statute of limitations barred the claim on the first day of January, 1873, or by that day. On that day the constable called to see Kirkwood at his house, showed him the notes, and told him he had them for collection. The constable asked him if he intended to plead the statute of limitations, when the complainant said he would consult a lawyer about it; and thereupon agreed to meet in Paris the first Monday in January, some days after, and decide upon the matter. They met and agreed to have the case tried before a justice in that town, and did so.

The constable then presented the warrant, dated 28th of December, and they went to trial on it, and the case went on under this warrant, the defendant insisting on the statute of limitations, and that no warrant of that date had been served on him before the first of January—nor any warrant mentioned then or shown to him.

The proof sustains his view of this question—not

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only by his own testimony—but that of another person who was present. The constable was dead before taking the testimony in the chancery court.

The warrant was not valid as filled up by the constable and signed by him, in the absence of the justice—not even in his office—but probably at the constable's home. It is an official act, which cannot be done by power of attorney. If done in his presence with his approval would be valid, but it would be going too far to say a verbal authority to sign his name, in his absence, would be a proper exercise of a judicial function by these officers. By section 4145, a justice is prohibited himself from signing any leading process or attachment, unless written out at length, so as to be complete. This shows that public policy requires that there should be personal action of the justice, and that certain requisites and care should accompany his act. In this case it is shown that before the trial probably, the constable called on the justice to know if he approved the signature, which he did. If this could be effective, it was after the statute had completed the bar.

The party appeared before the magistrate, and if he had chosen to do so, might have waived the issuance of process, or assuming he had done so, it could not be under the facts, that he thereby is bound by the date which the officer has affixed to the warrant. He is not shown to have known this date, or even the existence of any warrant, till he saw it on the trial before the justice. To have waived his rights he must have known the facts, that the warrant had

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been issued, and its date; without this, his agreement to try the case before the justice in Paris could not estop him from showing the facts. If he had known the facts, and then agreed to try the case on that warrant, he would have been bound by it, but it is very certain, we think, he would not have waived his right, if he had known the facts.

We must take the case as commenced, at most, when he agreed to try it before the justice, and then the statute had completed the bar. This being so, the complainant is entitled to relief, and the decree of the chancellor must be reversed with costs.

DIGGS TRAVIS v. L. & N. R. R. Co.

It is not error for the court to refuse to grant a jury to try a cause where the jury has not been demanded in the pleadings, upon an affidavit that two dockets are not kept and the act had not heretofore been enforced. If a jury is not demanded in the pleadings it shall be conclusively held to be an agreement to try without a jury, and the failure of the clerk to keep two dockets is no part of the agreement and cannot impair the operation of the statute.

FROM HENRY.

Appeal in error from the Circuit Court of Henry county. C. ADEN, J.

Travis v. Railroad.

J. N. THOMASON for Travis.

COLE & SWEENEY for Railroad Company.

DEADERICK, C. J., delivered the opinion of the court.

Plaintiff brought suit in December, 1878, in the circuit court of Henry county, against defendant for injuries sustained by being run over by a train on its road. The case was tried by the court without a jury, and judgment rendered for defendant, from which plaintiff has appealed in error to this court.

It is here insisted, as error, that the court refused to grant a jury for the trial of the cause upon the application and affidavit of plaintiff. The affidavit states that the act of 1875, as he is informed and believes, has not heretofore been enforced, and the cause is docketed on the same docket heretofore in use. The pleadings were made up at the January term, 1879, and a jury had not been demanded by either party. The application for a jury was made by plaintiff, at May term, 1880.

The act of 1875 requires, where suits are originally instituted in courts of record, that the party demanding a jury, shall do so in his first pleading, and upon failure to do so, it shall be conclusively held to be an agreement to try without a jury. The clerk is required to keep two dockets, and ought to do so in compliance with the directions of the statute. But it is the failure to demand a jury by either party, that is conclusively held to be an agreement to try without a jury, and the failure of the clerk to keep the

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two dockets, is no part of such agreement, and cannot impair the operation of the statute in respect to the jurisdiction of the court to try the case.

We have held this act to be valid in a number of cases. There was, therefore, no error in the ruling of the court on this point.

It appears that the engineer in charge of the train at the time of the accident, is dead. Plaintiff was injured some 10 or 12 miles from Paris, at about 9 o'clock at night, and was brought to Paris for surgical treatment. Two or three hours after the return of plaintiff to Paris, it is said the engineer, in presence of the plaintiff and others, stated that he did not see plaintiff until he was struck by the locomotive. This evidence was objected to and excluded by the court.

There was no error in this. It certainly was not a part of the *res gestæ*, but a narrative of what had transpired, at a different time and place. Nor was it admissible as an admission or declaration by defendant. So, in no aspect of the case was proof of what the engineer, at that time said, evidence against the defendant.

There is evidence showing that the plaintiff went to sleep with his leg upon the rail of the track, probably drunk, lying in such a position as to escape observation until the train was within about 70 feet of him, although the engineer was upon the lookout, and that as soon as he was discovered, the alarm was sounded, breaks put down, and every effort made to stop the train, which it was impossible to do, until it

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had passed over the leg of plaintiff, and so mangled it as to necessitate amputation.

It is evident his own recklessness occasioned the injury, and the judgment was correct and will be affirmed.

JAMES NOLAN v. JAMES CAMERON *et al.*

RES ADJUDICATA. *Judgment.* It was agreed that the judgment of the Supreme Court in a certain case should determine the other cases pending in the court below. Judgment was entered in the Supreme Court, and it is *held*, that upon trial of cases below, upon proper issue, by answer or plea, the invalidity of the judgment of the Supreme Court might be shown as that the parties were dead at the time of rendition of judgment.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. McDOWELL, Ch.

BIGELOW & HILL for complainant.

H. C. KING for defendant.

FREEMAN, J., delivered the opinion of the court.

The question conclusive of the controversy in **this** case is, whether the plea of *res adjudicata* was prop-

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erly decided by the chancellor in favor of the defendants.

The principle that governs as to the effect of a former adjudication, is thus stated by the Supreme Court of the United States: "So far as the demand or matter thus involved in the suit is concerned, the judgment has closed all controversy; its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, *as between the same parties*, but as to any matter which might have been brought forward and determined respecting it. When the judgment, however, is offered in evidence between the same parties upon a different demand—it operates as an estoppel only upon the matter actually at issue and determined in the original action: *Cromwell v. Sac County*, Am. Law Reg., vol. 16, 74; *Davis v. Brown, Id.*, 481. With these rules our own cases accord.

It is not seriously contested in argument, that this very question, as now in contest between us, has not been presented as between these parties, and judgments had against complainant on the question. If contested, however, it need but be stated, that this question was one that might have been made, when the executions were ordered in the cases reserved in the court below to await the result of the test case that had gone to the supreme court. It was made in the Dupuy case, and probably in other parts of this much litigated matter. In fact, it is clear this question has been

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adjudged, or was necessarily a defense that might have been made in repeated instances—if it had any validity—of which there might well be much doubt.

On the facts of the case, the question now urged is, that when the test case was taken by the present complainant to the supreme court, an agreement was entered in the court below that the other cases (some five or six in number), should abide the judgment in that case. The judgment was against the appellant in that case, and the judgment certified to the court below, whereupon execution issued in accord with that decision of this court. It is now urged that the test case was tried after the death of the defendants in error, and that judgment therefore, as a judgment, is void. Concede the fact to be so, the argument and the fact might be a good one against the enforcement of that judgment—but it is doubtful, to say the least of it—whether the validity or invalidity of that judgment has much bearing on the other cases. It is probable the true meaning of the agreement is, that the opinion or judgment of this court on the legal questions involved, were to be decisive of the rights of plaintiffs in the reserved cases and not the validity or invalidity of the judgment as between the parties.

Be this as it may, however, the cases cited by counsel and argument based on them, have no application to the question now before us.

It was probably held in these cases, that in actions of ejectment and other suits at law, where a record of judgment was introduced as evidence to sustain or defeat a right, that if it was valid on its

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face, its invalidity could not be shown by testimony *aliunde*. These cases were all ruled properly.

But it has not been held that where the judgment is directly sought to be enforced, or its validity directly in contest, as in this case, that you cannot show it to be a nullity, either when so alleged in an answer or on a plea in a court of law, by showing the court had no jurisdiction of the parties—or that it was obtained by fraud—a judgment had where the court had no jurisdiction of the parties, or of the subject-matter, is void. So, when the parties are dead: Waits Act. and Def., vol. 4, p. 195; 10 Hum., 342; 2 Heis., 303.

This is not within the principle of the case referred to, nor contrary to them. The matter of the existence of the judgment was the very matter set up in the answer of the Dupuy case in this record, and the party could have well proven the allegations therein made—if material to his defense. So, in several other of these proceedings, the defense was open to him, as far as it was legally available—certain it is—he has lost all benefit of it—if it ever was a good defense, by what is presented in this record. Of this we can have no question.

Affirm the decree.

Duncan v. Starr.

JOSEPH DUNCAN v. DAVID STARR.

PLEADINGS AND PRACTICE AT LAW. *Replevin. Estray.* An action of replevin cannot be maintained for an estray where the plaintiff has not taken the steps required by the statute to have the animal appraised and advertised.

FROM HARDIN.

Appeal in error from the Circuit Court of Hardin county. T. P. BATEMAN, J.

PITTS & CUNNINGHAM for Duncan.

CRUMLEY & HAMILTON for Starr.

DEADERICK, C. J., delivered the opinion of the court.

This is an action of replevin to recover a cow. The writ was executed and the property sued for delivered to defendant in error, Starr, who was plaintiff below. Judgment below was for Starr, and Duncan has appealed in error to this court.

The animal, in the fall or winter of 1876, was a yearling, and as stated by Starr "took up with his cattle," and was fed by him two winters, and he adds that "she was a stray," and he never claimed her as his own. The animal did not "come up" with his cattle—he did not know what had become of her.

Duncan swears she was with his cattle, and grazed, and was pastured with them from 1875 or 1876, until

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she had a calf, he kept her until she had a calf in the spring, and then let a poor woman have the use of her during the summer, and in the fall the cow and calf were returned to him, she was then replevied 28th of November, 1878, by Starr. Both parties admit, and the evidence shows, that the animal was an estray, and neither of them took any steps as required by our statutes (Code, secs. 162-6, *et seq.*), to have it appraised and to discover its owner.

The action of replevin is given to recognize the possession of goods wrongfully seized or detained (Code, sec. 3374), and may be resorted to when. plaintiff has a present right to the possession of personal property: 2 Swan, 358.

To maintain the action the plaintiff must show the title in himself, or a present right to possession. And the defendant may rely on any defense showing a want of title and right of possession in plaintiff, as that a stranger is the owner: 1 Sneed, 314; 5 Baxt., 581.

If plaintiff had taken the steps required by the statute to have the animal appraised and advertised, he would then have acquired a right of possession, which would have sustained this action. But upon the facts assumed in the charge, we think his Honor erred in instructing the jury, that if the cow ran with plaintiff's cattle, and was fed and cared for by him, for one or two years, or for a longer or shorter time, she would be in his constructive possession, and he might reclaim her as against any one but the true owner. She was, in fact, but a stray, which he admitted, and which he laid no claim to, and could only

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assert a right of possession to her by proceedings instituted under the statute. If the animal left his stock and took up with his neighbor's, this would give him no legal right to assert a claim to any special property in her, or to the right to take possession of her.

Plaintiff had no general or special property in the animal, nor right to the possession of it, which can be enforced at law.

The judgment must be reversed.

THE STATE v. DAN GOOD.

COSTS. Justice of peace. Warrant. A warrant issued upon information and the person making oath informing the justice of the peace that he knew nothing of the facts himself, but had been told by a third party that the offense had been committed, is improvidently issued and without sufficient legal grounds, and the justice is not entitled to have cost taxed against county.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. L. B. HARRIGAN, J.

ATTORNEY-GENERAL LEA for the State.

LUKE E. WRIGHT for Justice.

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DEADERICK, C. J., delivered the opinion of the court.

In this case, P. J. Quigley, a justice of the peace of Shelby county, upon the information on oath, of one C. Herndon, issued a warrant for one Dan Good, for assault and battery. Good was discharged, and the justice asked the court to allow his costs to be taxed, for payment by the county.

The judge was of opinion that the warrant was groundlessly and improvidently issued, and refused to allow the justice any costs, and he has appealed to this court.

The party giving the information to the justice, knew nothing of the commission of the offense, but had been told by a third party such offense had been committed, and so stated to the justice. Under these circumstances the magistrate ought not to have issued a warrant, as being informed that the informant knew nothing about the matter, he could not have been satisfied that such offense was committed, as he should have been before issuing the warrant: Code, sec, 5022.

The warrant was, therefore, issued improvidently and without sufficient legal grounds, and the judgment of the criminal court refusing to tax the costs thereof is affirmed.

Porterfield v. Taliaferro.

J. M. PORTERFIELD, Adm'r. v. C. W. TALIA-
FERRO *et al.*

ADMINISTRATION. *Attorney's fees.* An administrator, who incurs liability for attorneys fees beyond the assets of the estate in his hands, without consent or request of the heirs, cannot subject the real estate to sale for satisfaction of such liability.

FROM HARDIN.

Appeal from the Chancery Court at ——— G. H.
NIXON, Ch.

A. G. McDOUGAL for complainant.

L. H. & D. W. BROYLES for defendant.

McFARLAND, J., delivered the opinion of the court.

The record is obscure, but we understand the facts necessary to present the questions to be decided, are as follows: Wm. Pyburn died in Hardin county in 1861. C. W. Taliaferro was appointed administrator, but after converting some of the assets left the State, without accounting for what he had received. Peter P. Pach became administrator *de bonis non*, in 1865. Several suits were brought against him, in one case there was judgment against him at law for upwards of \$1,700. Two other suits at law were brought for smaller sums, which were defended by the administrator, and a bill in chancery was brought against

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him, claiming upwards of \$2,000, which was also defended. On the 26th of January, 1867, said Pach filed an insolvent bill in which he obtained an injunction against the suits at law, and praying for a sale of lands to pay the debts. The bill conceded that the judgment that had been obtained was a valid debt, and would have to be paid, and assumed that the result of the other cases was doubtful, and there were not sufficient assets to pay the debts. In 1870 the death of Pach was suggested and proven, and the cause was revived in the name of J. M. Porterfield, second administrator *de bonis non*.

The lands were sold by a decree in the cause, but subsequently the heirs filed a bill and had the sale set aside upon the grounds that they had not been brought before the court. The heirs were subsequently brought in by regular process, and the cause again proceeded. The chancellor perpetually enjoined the suits at law against the administrator, holding that the plaintiffs in the actions had no valid claim against the estate. The bill in chancery was also decided in favor of the administrator, upon what ground does not appear from this record, and there seems to have been no other claims except the judgments referred to, and the heirs were held protected against this by the statute of limitations, so that there were no debts against the estate for which the lands were liable, in fact, as the record cites no debts at all, but we take it that the judgment referred to was valid against the administrator.

Upon the rendition of the final decree rejecting all

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claims against the land, an account of solicitor's fees was taken, showing certain fees due to the firm of A. G. & J. McDougal and A. G. McDougal individually, and Messrs. Campbell & Jackson, for services rendered in behalf of the administrator, in defending the bill in chancery referred to, and also the two suits at law, and filing and conducting the insolvent bill.

The report was confirmed without exception, and the master was directed to collect the balance of a judgment referred to, and any other debts due the estate, and pay the same—together with a small fund in his hands—after retaining costs—to said solicitors *pro rata*.

Some time afterwards, the said solicitors, together with Porterfield, filed a petition in the cause, in which they claim the fees allowed them by said report and decree, and also \$35, as compensation to the administrator Porterfield, and pray a sale of the land descended to the heirs to pay said sums, less a *pro rata* received by the solicitors from the clerk and master. The petition says that there are no means in the hands of Porterfield to pay said sums, and they know of no means except the lands. The heirs resisted the petition upon various grounds.

We are unable to see the principle upon which the decree of the chancellor, for a sale of the land, can be sustained. In the first place, it does not appear that the personal assets have been exhausted. From the decree referred to, directing the master to collect debts due the estate, it is to be inferred that such

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debts are in existence, in fact, the record shows the existence of debts not satisfactorily accounted for, and in my view of the case, the lands of the heirs cannot be reached until it is affirmatively shown that the personal assets have been exhausted.

But in the next place, we do not see how the lands of the heirs can be taken to pay the compensation of the administrator, and his counsel fees, where there were personal assets, and where it has resulted that there were no debts against the estate—at least none which can be made a charge upon the land.

The administrator has the right to retain out of the assets in his hands compensation for his services. When he employs counsel he is ordinarily individually responsible for their fees, but he will be allowed, in his settlement, the amount of the fees thus paid or incurred, if they are shown to be reasonable in amount and necessary and proper. The expenses of administration are a prior charge upon the assets in the hands of the administrator.

If, however, the administrator chooses to incur expenses in the way of counsel fees, in defending suits against him, over and above the assets in his hands, without the consent or request of the heirs, we do not see how the latter, or their lands, can be liable for such expenses. The insolvent bill, so far as it sought a sale of the land of the heirs was, as the result showed, wrongfully instituted. There were no debts established authorizing the sale. The sale that was had was set aside at the instance of the heirs, in a suit in which they employed their own counsel, and

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so the insolvent bill was successfully resisted by them. It does not matter, that finally, the counsel for the administrator took sides with the heirs in resisting the sale. We think the heirs cannot be required to pay the counsel fees of the administrator for wrongfully presenting this suit against them.

So far as this suit was a defense against the suits brought against the administrator, and so far as the other defenses to said suits are concerned, the administrator was in the right according to the result, but as we have said, it has not been shown that there were not other assets sufficient to pay the necessary expenses of defending these suits; and further, if it were otherwise, we do not see that if the administrator choose to incur liability beyond the assets in his hands, without the request of the heirs, that they can be held liable.

The decree of the chancellor must, therefore, be reversed, and the petition dismissed.

Currey v. Wright.

A. P. CURREY v. MARCUS J. WRIGHT *et al.*

SHERIFF. *Contest. Fees.* W was inducted into office of sheriff. C contested his right to the office. The contest was decided in favor of C. W had collected a part of his uncollected fees, to the clerks of the several courts for indebtedness. Upon bill filed by C, *held*, that the fees in specie belonged to C, and as to the fees earned by W and not reduced to possession, C was entitled to recover against the assinees.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. R.
J. MORGAN, Ch.

W. M. SMITH and W. M. RANDOLPH for complainant.

H. C. KING, J. O. PIERCE and CLAPP & BEARD for defendant.

FREEMAN, J., delivered the opinion of the court.

In 1870 Currey and Wright were candidates for the office of sheriff of Shelby county. A contest as to the right to the office was had between them before the county court, when Wright was inducted into office. A bill was then filed by Currey under section 3409, and sub-sections, in the county court, enjoining Wright from exercising the functions of the office, and soon after this, Wright filed a similar bill, and obtained an injunction against Currey, and on motion before the court, had the injunction granted in favor of

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Currey dissolved. The contest then went on between the parties—Wright being in possession of the office under these proceedings until July, 1872—when this court decided in favor of complainant, and ousted Wright from the office, and gave it to Currey.

Thereupon, on the 31st day of August, 1872, the present bill was filed against numerous parties, seeking to have an account of, and to recover the fees and emoluments of the sheriff's office which had accrued during the period of Wright's occupation. The main matters as between Wright and sureties on several bonds given during the proceedings referred to, have been disposed of, and are not appealed from, nor before us on the present record.

The only questions presented by the present appeal, arise between the clerks of three of the courts of Shelby county, who are made defendants, and are required to render an account of such fees as have been received by them, in their respective offices, as were due said Wright, by virtue of his office as sheriff. In addition, there is a claim adjudged in favor of a number of parties, claiming to have acted as deputies of said Wright, who have intervened in some way, and have had decreed to them satisfaction in this proceeding of their claims, or assumed claims against Wright, in preference to the claims of complainant Currey.

It is proper to say, that a considerable sum of these fees, were found in the hands of the clerks, and otherwise due Wright for services rendered while executing the office of sheriff, and the contest is now narrowed to the question, as to whether complainant,

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or the clerks mentioned, and assumed deputy sheriffs, who were appointed and employed by him, shall have this fund?

The theory of the bill is, that the fees, and perquisites of the office went to the party legally entitled to the office, and so the prayer is for an account of all fees received, or earned during the incumbency of Wright. Wright, himself, and the other parties, have submitted to the decree. The clerks claim the right to retain fees in their possession and accruing in their respective courts, by virtue of assignments transferring them to them, made by Wright in consideration of the fact, that Wright, while acting as sheriff had, by virtue of his office, collected large sums in the shape of fees due these clerks, and had failed to pay or account for the same.

They further claim to set-off the amount due from them, as fees collected for Wright, against complainant's claim. This last ground we do not understand to be very seriously urged, and cannot be sustained if urged, provided the theory of the bill be correct, that is, that the identical fees earned by Wright, belong to complainant as the party rightfully entitled to the office. If the fees are complainant's, and were his when earned, then it could not be, that a debt due from Wright for monies collected for these clerks, would constitute any proper basis of set-off, as against complainant's claim and recovery, as sought in this proceeding.

The question is, whether the claim of complainants is maintainable? Is a party who has been wrongfully

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excluded from the possession of an office, when his right has been asserted, and he put into possession, entitled to the specific fees earned by the wrongful incumbent, as his own property or money, precisely as if he had been in the exercise of the functions of the office, had rendered the legal services and thereby had himself earned the specific fees claimed?

We are not aware that this precise question has been before this court for determination. The argument of one of complainant's counsel involves the concession, that his claim is as we have stated, for he insists that Wright "could not assign more than he possessed," and that the "fees of the office did not belong to him, but to Currey, and of course he could not assign them to respondents." Complainant's claim, must of necessity, rest on this ground, for if it was only for damages against Wright, to be ascertained and measured by either the amount of fees received, or the amount of fees, less value of his services in earning them, there could be no claim to any particular fees in specie, and the assignment of Wright would carry them, the complainant being only entitled to his personal recovery against Wright, the amount to be ascertained by the one standard or the other we have mentioned—or at any rate, by some proper measure; but still this would not give any claim on the particular fees in specie, however his damages might be measured.

The case of *Memphis v. Woodward*, 12 Heis., 499, was a suit against the city to recover a salary fixed by law. Lynch had excluded Woodward from the

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office, by virtue of an injunction. When the right of Woodward was declared by this court, he brought suit against the city for the salary, on the ground that he was, at all times, ready and willing to perform the duties of the office. It was held that he was entitled to recover—the Chief Justice delivering the opinion—puts the case mainly on these grounds: First, that Woodward's claim to the salary followed his title to the office, and no payment to another of money that belonged rightfully to the claimant, could, although made under an erroneous order of court, operate as a payment or satisfaction of his claim. Second, that the injunction did not require the payment of the salary to the wrongful claimant. This case may stand on the ground of a wrongful payment made by the city—and its duty to pay only to the rightful claimant. But whether rightly ruled we need not now stop to inquire. It does not raise the question now before us, nor could it decide it.

The suit was, in that case, against the party owing the salary, by the officer who was legally entitled to the office. This is a suit against the wrongful incumbent who has entered upon the office without lawful authority for an account of the fees received, and as between the appellees before us, is a claim to have the specific fees earned paid over to complainant, on the ground that they are the property of complainant. If the suit had been against the parties who had paid them to Wright, the cases would have had more similarity, the only difference being, that in the one case it was a fixed salary—the other—adjudged costs and fees.

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We find numerous cases in which the suit was against the intruder for damages. Some holding, that where there was a fixed salary, the measure of recovery was the amount of the salary which the party excluded would have received, had he been in office: *People ex rel Benoit v. Miller*, 24 Mich., 458; 9 Am. R., 131: *United States v. Addison*, 6 Wallace R., 291. And where there are fees and perquisites, some cases hold, that the measure of recovery is the fees of office less the expense of earning them by the *de facto* officer, where he had made claim to the office in good faith. See *Mayfield v. Moore*, 53 Ill., 428; 5 Am. R., 52. We need not undertake to review the cases, or reconcile the real or apparent conflict found in them. We can only endeavor to reach the best conclusion possible on the particular question before us.

The case is, Wright had wrongfully got possession of the office of sheriff under color of law. While acting in that office he had earned fees, which were collected or received in the usual course of their official actions by the clerks of the courts. The clerks were bound to account for and pay over these fees to Wright on his demand. The complainant would have earned these fees had Wright not entered upon the office. As between Wright and complainant, who has the better legal right?

After much consideration, we conclude that as to fees earned, but not reduced to possession, the rule that shall give the rightful officer such fees will best reach the practical justice of the case. The principle on which part of a salary unpaid, though earned by

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the wrongful incumbent—in the case of *Dolan v. Mayor*, 68 N. Y., 283—was adjudged to the rightful claimant of the office, after his right had been declared, sustains this ruling. The court says: “We think it may be consistently held, that the plaintiff may treat the services as having been rendered by Keating for him, and may recover the unpaid salary on that assumption.” While this is not the fact, and it would be better to say simply that because of the wrongful exclusion of complainant, the other party shall not be permitted to assert any claim growing out of his wrongful act, and as between a wrong-doer in such a case, and rightful claimant, the latter has the superior right. This is not sustainable on any logical theory based on the facts of the case, but it is sound, practical justice, nevertheless.

The legal logic of the case would probably be, that the party who had done the wrong, was liable to respond personally in damages to the party wronged, and this was a personal demand to be ascertained by a court and jury, under the rules of law, which, when ascertained by a judgment, was to be enforced by the ordinary process of law in the ordinary mode. Or, if a court of equity was resorted to, as in this case, the amount due should be ascertained and decreed, as a personal demand, and enforced as such. We think, however, the justice and right of this case will be reached by the result we have indicated, confining our decision to the very case in hand, deciding nothing as to other questions that may arise in such cases as between the rightful claimant, and a party who wrongfully obtains and holds possession of an office.

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In this view, the clerks, as assignees, stand in the shoes of Wright, and can assert no claim above what he could have done by virtue of the assignment. It is an assignment of a chose in action, non-negotiable, to be applied to the payment of an assumed indebtedness, and so on: no principle can these assignees have any superior position to their assignor. In addition, it is very clear they took the assignment with full knowledge that the right to the office was being contested hotly, the case then pending in one of the courts of the city, in which one of the parties, we believe, was then clerk.

As to the claims of certain parties as deputy sheriffs, we need but say, that from this record, they are not in any way parties to the suit. One of them seems, on suggestion that he had been employed as deputy, and had not been paid, to have been allowed by order of the court, to come into the case, the order, however, expressly stating that nothing was adjudged thereby—and he was only to come in and make good his claim if he could. There is no pleading asserting his claim, and no issue on which a decree could rightfully have been made. Some others seem to have been permitted by the court, to come in on filing a petition, and giving bond to prosecute their claims, but no such petition or bond is in the record, and the clerk states no such papers are on file. Even if before the court, on the facts, we can see no ground on which they could claim any of these fees as against complainant, as it appears they were employed by Wright at fixed salaries—and had only a personal claim against him

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for services—to be enforced by suit, but certainly neither lien or charge on the official fees.

We therefore hold, that the complainant has the superior right as to fees not received by Wright, either in the hands of the clerks, or to be collected—and that the parties claiming to be deputies of Wright, have no right to any fees which were earned by Wright, and their claim is disallowed.

A decree will be drawn in accord with this opinion. Defendants will pay costs of this court, and of the court below, so far as incurred in reference to their claims.

GEO. C. CAMP, Adm'r. *de bonis non*, v. WM. and JAS.
SHERLEY *et al.*

AND

JOS. R. HAWKINS *et al.* v. WM. SHERLEY *et al.*

1. CHANCERY PLEADINGS AND PRACTICE. *Insolvent estate. Filing claims.*

It is not necessary that a creditor should make himself a party by petition, to an insolvent bill, if in the bill his claim is stated as a valid and subsisting claim against the estate. Filing his claim with the clerk within time will bar the statute of limitations.

2. ADMINISTRATION. *Real estate. Alienation by heir.* The execution of a deed of trust by an heir upon lands descended to him from his ancestor, to secure a pre-existing debt, is not such an alienation by the heir as can defeat the right of creditors to subject the real estate of the an-

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cestor to the payment of his debts. The land, by statute, is assets for this purpose, and to allow the heir to appropriate it for his own debts, by deed of trust or mortgage, would defeat the law.

FROM HENRY.

Appeal from the Chancery Court at Camdem. G.
H. NIXON, Ch.

T. A. HENRY and A. J. FARMER for complainants.

A. G. HAWKINS, H. C. TOWNES and HAWKINS &
JONES for defendants.

DEADERICK, C. J., delivered the opinion of the court.

In August, 1875, Jas. Sherley departed this life, and at September term, 1875, of the county court of Benton county, his sons, the defendants, James and William Sherley, were qualified as his administrators.

The intestate left at his death a small personal estate and three tracts of land, in said county. On the 23d of September, 1875, the administrators, who, with the minor children of a deceased sister, were the heirs at law of said intestate, filed their petition in the county court of said county of Benton, for a sale for partition of said three tracts of land. In their petition they allege that the widow was entitled to dower, and that their sister, in her lifetime, had been advanced by their deceased father in lands and personalty in an amount greater than either of them could receive out of the remainder of his property, and it is probably true she had been so advanced. The heirs of the sister were made parties, a guardian *ad litem*

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appointed for them, and a decree rendered, upon proof taken, directing a sale of the land, after allotting dower to widow.

The land was sold and James Sherley bought one tract for \$400, and William bought the other two tracts at \$450. This sale was confirmed and title vested in the purchasers, retaining a lien for the purchase money. Ten per cent was paid before confirmation, and nothing has been paid since.

After the land was sold, William, being indebted to complainants in the cross-bill, Jos. R. & A. G. Hawkins and H. C. Townes, on the 19th of November, 1875, executed a deed of trust on the two tracts he bought, to secure to them the amount of his indebtedness.

Complainant Camp, who was one of the sureties of said James and William Sherley, administrators, having given them notice that he would apply at December term, 1876, to be released, was, on their resignation as administrators, appointed administrator *de bonis non* of said estate. And in December, 1877, said Camp filed this bill, in which he alleges that he has ascertained, and suggested to the county court, the insolvency of the personal estate; that the administrators had paid some of the debts, but there were still outstanding valid debts against the estate, and there were no assets for the payment of the same in his hands, or which could come to his hands. The bill prays for the transfer of the administration of the estate from the county, to the chancery court. The bill recites the facts connected with the sale of the

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lands, and prays for the sale of the same for the satisfaction of said debts.

The bill then alleges that there are two notes of \$125 each (with some small credits), one due in 1874, and one due in 1875, and an account due Joel Teddor for \$12.50; \$125 due M. M. Fry, due in 1876; and also \$12.50 by note, due in 1874, to Hubbs & Fry; burial expenses of \$30 or \$40 due W. P. Morris, and for coffin for intestate, due John J. Holland, \$10 or \$12, all of which debts the bill states are just due and outstanding, and perhaps other debts.

Hawkins and others, the beneficiaries in the trust deed, with the trustee, filed their cross-bill, having been made defendants to the original bill, in which they claim, that under said deed, they are entitled to have proceeds of sales of land applied first to their debts secured in said trust deed. They also contest the claims of the creditors of said estate.

His Honor, the chancellor, ordered a report to be made by the master, showing what personal assets had come to the hands of James and William Sherley, as administrators, or to the hands of Camp, as administrator *de bonis non*, and what debts were still outstanding against the estate, and how the accounts for receipts and disbursements of said administrators stood.

The master reported a balance in the hands of William and James Sherley, as administrators, of \$250.50, after allowing credits amounting to \$253.45, and that there was nothing in the hands of Camp, as administrator, or chargeable to him.

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The master also reported, that the several debts specified in the bill as due and outstanding, were valid claims against the estate. He reported, also, in favor of others, not enumerated in the bill, and one debt in favor of William Shurley, one of said administrators, of \$26.76, including interest to December 15, 1879.

Exceptions were filed to all the claims except that of William Sherley, by the defendants, William and James Sherley, and the complainants in the cross-bill, mainly on the ground that the complainants had not been formally made defendants to the bill, by petition.

The claims specified in the bill had all been filed within less than two years from the original grant of administration, but none of these claimants had filed formal petitions praying to be made parties defendants.

The chancellor overruled the exceptions, as to those claims set out in the bill, and allowed them, and the claim of William Sherley, only. He also allowed exceptions of James and William Sherley, which reduced the finding against them to \$70.24, and allowing the said claims specified in the bill, shows an aggregate of \$439.94, debts still due from the estate.

The chancellor then recites the proceedings of the county court under which the said land was sold to William and James Sherley, and declares that William owes upon his purchase \$405 and interest, and James owes on his purchase \$300 and interest, and decrees if the sums due are not paid in sixty days the land shall be sold, and proceeds of James Sherley's land shall be first applied to the debts due from

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the estate of James Sherley, deceased, and if not sufficient, then the proceeds of the tract purchased by William Shurley shall be applied to pay the balance of said debts, or so much thereof as may be necessary to that purpose, and the residue, if any, shall be applied to the satisfaction of the debts secured to the complainants in the cross-bill, by said deed of trust.

William and James Sherley pray an appeal from so much of said decree as charges them as administrators, with the sum of \$70.94, and as allows the claims of creditors against the estate, and which directs the sale of said lands for the payment thereof. But failing to give bond within the time prescribed, they have filed the record for writ of error. The complainants in the cross-bill appeal from so much of the decree as postpones their claims secured by the deed of trust, to the debts due from the estate of James Sherley, deceased.

It appears that a claim for \$26.76 is allowed William Sherley, by the master's report, and the decree of the court. This was for payment of a debt due from the estate, and instead of being allowed as a charge against the estate, should have been credited on the \$70.24 found against him, and thus reduce the amount found in his hands to \$43.48, and reducing also, by the amount of said claim thus credited, the outstanding liabilities of the estate.

As before stated, all the claims allowed were specifically named in the bill as valid and outstanding debts of the estate. None of them were barred by any stat-

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ute of limitations. Most of them proved to be just, none proved to be otherwise. In such case, we hold it is not necessary that the creditor should make himself a party defendant by petition, but the filing of the claim with the clerk within time, will save the bar of the statute.

The trust creditors, acquired by their deed, no superior rights to creditors of the estate, but they must be held to take in subordination to the rights of such creditors. Executing a deed of trust, by an heir to secure a pre-existing debt, is not such an alienation by the heir as can defeat the right of creditors, to subject the real estate of the ancestors to the payment of his debts.

Neither the trust creditors nor the said heirs at law can complain, that the real estate of the deceased shall be applied to the payment of his debts. Our statute has made it assets for this purpose, and to allow an heir, within three months after the ancestor's death, and before the law will allow a creditor to institute any proceedings, to appropriate the whole real estate to secure his own debts, by deed of trust, or mortgage, would be practically to defeat and annul the law.

The chancellor's decree has reached the substantial justice and equity of the case, and with the slight modification indicated, it will be affirmed. The costs of this court will be paid one-half by the complainants in the cross-bill, and the other half by William and James Sherley, and the costs below as adjudged by the chancellor, and the cause will be remanded for further proceedings.

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SARAH A. WILLIAMS v. M. D. WHITMORE *et al.*

1. CHANCERY PLEADINGS AND PRACTICE. *Land sales. Taxes.* It is the duty of the court under the act of 1871, upon all lands sold under decree of the court, to have a reference to the clerk and master as to the amount of taxes due upon day of sale, and this before confirmation of sale, but if by inadvertence this is omitted, it may be done after confirmation at any time while the funds are under the control of the court. The amount of taxes is to be paid out of the purchase money. If the sale is confirmed and the amount of purchase money is paid, or the notes for the purchase money delivered to creditors or their solicitors without payment of taxes, the court may, at the same term of the court, order the funds to be refunded for payment of taxes.
2. ATTORNEY'S LIEN. *Chancery Pleadings and Practice.* Where a lien upon a fund in court is declared in favor of two firms of solicitors and the same is insufficient to pay both, the court will not permit one firm to appropriate the fund to their fee. If there is not a sufficient fund to pay both, the lien should be enforced *pro rata*, and if one firm of solicitors has drawn the fund, the court will order it paid into court to be divided *pro rata*. If one of the firm who drew the fund is insolvent, the court will compel the partner who is solvent to pay the sum, although the partnership may have been dissolved after the beginning of suit and before the decree, and the solvent partner had no knowledge of the transaction, and received no part of the money.
3. ATTORNEYS. *Partnership.* Upon a dissolution of a law firm, in the absence of an agreement to the contrary, either member may give his attention to and, in the absence of the other, control any unfinished cases in which the firm may have been employed. As to such unfinished business they are still partners.
4. SAME. *Same. Liabilities of partners.* If a partner receive more than he is entitled to within the scope of his partnership, the firm must refund the excess.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

Williams v. Whitmore.

T. B. TURLEY for Harris.

J. E. BIGELOW for Hill.

GEO. GILLHAM for Fares.

HUMES & POSTON for Humes, Scott & Poston.

McFARLAND, J., delivered the opinion of the court.

This cause is before us upon two separate appeals presented at different times, by Isham G. Harris, from decrees rendered against him in relation to matters incidental to the original litigation.

Separate transcripts were made out upon each appeal, embracing such parts of the record as were thought to be pertinent to the questions involved. These transcripts contain in part the same matters, but each contains some part of the record not found in the other. The questions arising upon each appeal grow out of the same transaction, and for convenience, will be considered together. The original bill was, in substance, for the collection of a debt and for the sale of lands that had been fraudulently conveyed by the debtor. The complainant was successful, obtaining in this court, at the September term, 1875, a decree in her favor for a sum of money, for the collection of which the cause was remanded for a sale of the lands and further proceedings. The decree of this court declared a lien on the recovery in favor of Messrs. Humes & Scott and Messrs. Harris & Pillow, for their services as solicitors, in favor of the complainant. The first named were surviving partners of the firm of Poston,

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Humes & Scott, who has filed the bill. Messrs. Harris & Pillow were partners at the time of their employment, but the partnership had been dissolved before the decree was rendered.

On the 24th of June, 1876, the lands (being several town lots in or near the city of Memphis), were sold by the master, and the sale reported on the 3rd of October, 1876, and confirmed by a decree entered on the 27th of October, but there was at the time no divestiture or vestiture of title, the cause being retained on the docket to await the collection of the purchase money. The sale aggregated \$4,275, each purchaser executing three notes, due severally in 7, 12 and 18 months, payable to the master, for the aggregate amount of his purchases as follows: J. B. Fares, the purchaser of two lots, executed three notes aggregating \$1,550; J. A. Anderson, notes for three lots, aggregating \$1,195; Joseph H. Hill, for two lots, \$500; Arthur E. Hill, two lots, \$680, and G. J. Pillow, two lots, \$350.

Previous to said sale, to-wit, on the 9th of February, 1876, an order was entered reciting the lien declared by this court in favor of Messrs. Harris & Pillow, for their fees, and also, that they had filed a petition praying that the amount of their fees be fixed by the court, which had been served upon the complainant, and directing that the petition be taken for confessed, and that the matter be referred to the master to report the amount of the fees as early as practicable. On the 14th of the same month, on motion of Humes & Scott, surviving partners, a further ref-

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erence was made, directing the master to report upon their fees, at the same time he reported upon the fees of Harris & Pillow, and directing that notice be served on the complainant. On the 2d of October, 1876, the master made a report alone as to the fees of Messrs. Harris & Pillow, fixing the amount at \$2,000, and on the day the report of sale was confirmed, to-wit, the 27th of October, 1876, this report as to fees was confirmed by a decree which directed the master to turn over to said Harris & Pillow, said sum of \$2,000, *of the notes then in his hands*, the proceeds of said sale, and take their receipt therefor, and on the 31st of said month, the master delivered to Gen. G. J. Pillow, of said firm of Harris & Pillow, two of his own notes, two of the notes of J. B. Fares, and two of the notes of J. A. Anderson, aggregating \$1909.98, and took his receipt, signed by himself for "Harris & Pillow," and on the 3rd of January following, the master paid Gen. Pillow \$90.02, making in all \$2,000.

After the report of the master of the 2d of October, 1876, as to the fees of Harris & Pillow, and the confirmation thereof, on the 27th of October, as before shown, to-wit, on the 19th of December, 1876, the master, in obedience to the order of reference of the 14th of February, reported that the entire fee to the complainants in the case should be \$2,500, of which Poston, Humes & Scott should receive \$1,600. This report was confirmed on the 26th of January, 1877, except as the decree says, "so much of the report as refers to the fee of Messrs. Harris & Pillow

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which is not acted upon by the court, as the same had heretofore been acted upon." Messrs. Humes & Scott agree to remit \$100 of the amount allowed them, and the balance, \$1,500, was directed to be paid to them in the notes of the purchasers, or in money first arising from the proceeds of sale after the payment of costs. Shortly before this last decree, to-wit, on the 6th of January, 1877, a decree was entered showing that Gen. G. J. Pillow had transferred the two lots purchased by him to J. B. Fares, and title was vested in said Fares accordingly.

On the 21st of February thereafter, Messrs. Humes & Scott filed their petition, which was afterwards lost or mislaid, but they subsequently, under leave of the court, filed a substituted petition. The petition sets forth the facts hereinbefore recited. Shows that the firm of Poston, Humes & Scott was the original counsel in the case. That the report of the 2d of October, 1876, as to the fees of Harris & Pillow, and the decree confirming the same, and allowing them to withdraw \$2,000 of the notes, was *ex parte* as to said petitioners, and inadvertently made. That there was a large amount of taxes due upon the land, which, with the costs, should be first paid out of the proceeds of the sale, and this being done would leave of the fund not exceeding \$2,000. That they had received only \$150 for their fee, and Messrs. Harris & Pillow having withdrawn \$2,000 of the notes, there would be no fund left to pay petitioners or the balance of the taxes. The lien declared by this court in favor of complainant's counsel being joint, they in-

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sisted upon their right to have it enforced for their benefit jointly with Messrs. Harris & Pillow, in accordance with their respective rights, and to enforce this lien, they pray that Messrs. Harris & Pillow be required to refund a sufficient amount of the fund to enable the court to do equity. On consideration of this petition, a decree was made by the chancellor on the 23d of March, "suspending" the allowance to Messrs. Harris & Pillow, and the order under which the notes were turned over to Gen. Pillow, and the decree vesting title in Fares and directing that said decree remain suspended until the facts of said petition should be determined. This was during the same term of the court at which the orders and decrees so suspended were made; but as before stated, the notes had already been turned over to Gen. Pillow before the suspending order was made.

On the 14th of February, 1878, J. B. Fares, one of the purchasers, filed his petition or affidavit, in which, after stating that he was purchaser of two of the lots, shows also, among other things, that he had purchased from Gen. Pillow the two lots purchased by him. That of his two notes turned over to Gen. Pillow, as before shown, he had paid the first. The other had been, by Gen. Pillow, transferred to Estes, Fizer, & Co., who had brought suit upon it. Petitioner had paid his third note to the master in taxes due upon the land at the time of the sale. That he had also paid to Gen. Pillow the amount of his (Gen. Pillow's) notes, given for two lots purchased by him, which, as we have seen, was part of the notes turned

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over to Gen. Pillow in payment of his fees. The petitioner, Fares, having purchased these lots from Gen. Pillow, paid him the amount of his own notes. The petitioner then states that he paid of the taxes, which constituted a charge upon the lots at the time of the sale, \$18.57 more than the amount of his third note, which he had in this mode taken up, that there yet remains of said taxes \$510.75, which sums should be paid out of the proceeds of the sale, and which was more than his remaining note outstanding in the hands of Estes, Fizer & Co. The petition insists, that as a matter of law, that the unpaid taxes should be paid out of the proceeds of the sale, but states in addition, that at the sale of the lots it was so announced by the master. In this he is sustained by the affidavits of the master and W. A. Hill, previously filed. This petition prays that his last note in the hands of Estes, Fizer & Co., be brought into court and canceled upon the payment of the taxes. The petition shows that part of the unpaid taxes were upon the two lots purchased by Gen. Pillow and sold to petitioner.

An agreement of counsel was filed showing that the firm of Harris & Pillow was dissolved previous to the hearing of the cause in 1876. Gov. Harris becoming publicly known as a member of another firm in October, 1874. That the employment of the firm of Harris & Pillow in this case was previous to the dissolution—that Gen. Pillow took charge of, and gave his attention to the case—that all the proceedings in relation to the fee in this case in the name of Harris & Pillow, were conducted by Gen. Pillow after

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the dissolution—that the notes were received by him and appropriated to his own use. Gov. Harris received no part of said sum, and had no knowledge of the transaction, and that Gen. Pillow was indebted to him on their partnership account.

Upon the foregoing facts, the cause was, on the 13th of July, 1878, heard upon the motion of "Hill, Fares and Anderson," to have Messrs. Harris & Pillow pay in a sufficient amount of the fund withdrawn by them to pay any balance of unpaid taxes, and the court being of opinion that the taxes due upon the land at the time of the sale, should be paid before the solicitors were entitled to withdraw any of said fund, sustained the motion, and ordered Messrs. Harris & Pillow to pay in a sufficient amount of the fund withdrawn by them to pay said taxes, and referred the cause to the master to report the amount of said taxes. Before taking this account, however, Gov. Harris was allowed to appeal, and this is the appeal brought up in the first of the transcripts.

Subsequently the cause was heard upon the motion and petition of Humes & Scott, when the further facts were agreed to, that upon the dissolution of the firm of Harris & Pillow, each partner went forward to wind up and collect the unfinished business, not, however, attending to the same cases, and that the notes received by Gen. Pillow netted \$2,000 3d of January, 1877. The cause was referred to the master to report as to the taxes chargeable upon the land at the date of the sale and the costs. He reported, setting forth the taxes, and showing that after paying the

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taxes which were chargeable upon the property at the date of the sale, and the costs of the cause, there would be left of the proceeds of the sale, \$1092.04. That Messrs. Humes & Scott, surviving partners, were entitled to two-thirds of the fees allowed in the case, and Messrs. Harris & Pillow one-third. That Gen. Pillow, for Harris & Pillow, had received \$2,000 of the fund, and Humes & Scott had received \$150. The court, thereupon, rendered a decree in favor of Humes & Scott against said Harris, surviving partner, Gen. Pillow having in the meantime died, for \$500 (Humes & Scott agreeing to claim only that amount), and the costs accruing on said petition.

From this decree said Harris again appealed, which is the cause embraced in the second transcript. The first question is whether the purchasers of the land have the right to have the taxes then chargeable thereon paid out of the proceeds of the sale, or did they purchase subject to the taxes?

It was held in the case of *Stanton v. Harris*, 9 Heis., 579, that at a judicial sale for debt, the purchaser takes the property subject to the taxes, and is entitled to no abatement on that account, but it seems to have been held differently in the case of *Ellis v. Foster*, 7 Heis., 131. The case of *Childress v. Vance*, 1 Baxt., 406, holds that the purchaser, after paying for the land, may recover of the debtor the taxes which the purchaser was compelled to pay. This is also inconsistent with the theory that the purchaser buys subject to the taxes.

The question, however, now turns upon the con-

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struction of the act of 1871, if the rule be considered otherwise doubtful, the cases referred to having arisen previous to said act. It is entitled, "An act to provide for the collection of all taxes that are a lien upon real estate sold under the decree of any court in this State," and is as follows: "Whenever real estate is sold under a decree of any court in the State, it shall be the duty of the judge of said court, before the sale is confirmed to the purchaser, to have a reference made to the clerk, or clerk and master, to ascertain, if upon the day of sale, there were any taxes due and unpaid, which were a lien upon said real estate, and if it be found that there were taxes that were a lien upon the real estate upon the day of sale, a decree shall be entered in the cause stating the amount of the taxes, and directing the clerk and master, or clerk, to pay said taxes out of the first money collected from the sale of the said real estate."

The object of the statute was to expedite the collection of public taxes, it was passed in the interest of the public. It, however, establishes the rule as held in *Ellis v. Foster*, for it in terms provides that the taxes shall be paid out of the first money collected from the sale, and this necessarily implies that the purchaser gets the benefit of the payment. That is to say, he pays his purchase money to the clerk and out of this money the taxes are paid. He does not buy subject to the taxes. If the statute simply means that the court is to direct the clerk to take the first money paid in *as the money of the purchaser* and pay the taxes, the result would be that the

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money thus used to pay the taxes would not be a credit on the purchase notes. The creditor or parties in interest would have the right to compel the purchaser to pay the whole amount of his notes or his bid, over and above the amount paid in by him, and used to pay taxes. That is to say, take the first money paid in and apply it to the taxes, but give the purchaser no credits upon his purchase notes. The statute, however, will not bear this construction. The result is, that while the purpose of the statute was the collection of taxes, yet it has adopted a mode that establishes the rule indicated, if it were otherwise doubtful. Practically, it can do no harm, nor can it injuriously affect the rights of the parties in interest, as it may be fairly implied that the property will sell for that much more. It is only necessary that this rule be understood, and the purchaser knowing that the taxes are to be paid out his bid will increase his bid by the amount of the taxes over the sum he would give, if he buys subject to the taxes. So it results in collecting the taxes without legal injury to either party.

But it is argued that the failure to apply for the reference before confirmation of the sale, and before the creditor has received the proceeds, is a forfeiture of the rights of the purchaser in this respect. We think clearly not. It is true the statute says that it shall be the duty of the judge, *before the sale is confirmed* to the purchaser, to make the reference as to taxes. It is not made the special duty of the purchaser to move for this reference, it is made the duty

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of the judge, without motion; his over-sight or omission ought not to prejudice the right of the purchaser, his purchase was made with reference to the rule established by the statute, and the extent of his obligation and right thereby fixed. Although he becomes a *quasi* party to the cause, he does not assume its management, and if he presumes the judge will not neglect to observe the statute, his rights ought not thereby be precluded beyond recall. The mere fact that the decree confirming the sale—without, however, vesting title—is allowed to be entered before the reference, ought not to be conclusive of the question, moreover, this point was directly decided in *Ellis v. Foster*, 7 Heis., 131, and the taxes allowed as a credit after confirmation; not, however, upon the statute.

A strict compliance with the statute requires the reference before the sale is confirmed, but the sale notes not being due for some months, and hence no funds likely to be paid in, it would answer the purpose as well to have the reference as soon as the purchase money is due, in the meantime withholding from the purchaser a title to the land. At all events, the State would not loose the right to have the taxes thus paid, by the failure of the court to order the reference before confirmation, it might be had at any time while the fund is in the control of the court.

But it is again argued, that if the creditor—or which is the same thing, his solicitor—is allowed to receive the proceeds of the sale without any claim of this character by the purchaser, the creditor or solicitor cannot be required to refund the money. We do

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not say that the rights to have the money refunded, would, under all circumstances, exist and be unlimited. But the notes of the purchasers in these cases were not due for several months. On the day the sale was confirmed, and before any money was paid or due, \$2,000 of these notes were ordered turned over to one of the solicitors of the complainant. The purchasers could not have anticipated such an usual proceeding as this, or be held to have waived their rights by failing to be present to object, especially as during the same term of the court the order directing the notes to be so turned over, was suspended, although this was after they had been actually received. The case of *Johnson v. Molsbee*, 5 Lea, 444, is relied upon. That, however, was where a creditor *out of court*, in good faith, and without refunding bond, collected from an administrator the amount of his debt. It was held that other creditors could not compel him to refund any part of the sum, because the estate afterwards proved to be insolvent. The question here is, whether the court, while it still has jurisdiction of the cause, and of the parties, has the right to maintain its control of the fund to the end that it be appropriated according to the rights of the parties under the law, and for this purpose to recall any part of the fund which has been inadvertently and improperly paid out, or to have returned to the office of the clerk and master, the notes or other papers properly belonging to the office. We think the court ought not to loose control of the funds or subject-matter of the litigation until it has rendered what it

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assumes to be complete justice in the case. Neither the parties or their solicitors should be allowed to retain an advantage acquired under an order inadvertently made as in the present case, which results in defeating the rights of the parties, according to the settled law, especially when the order is at the same term suspended before it acquires the force of *res adjudicata*.

So far, therefore, as it may be necessary to secure to the purchasers the rights to have the existing taxes paid out of the purchase money, the order of the court requiring a return of the fund was proper. The account in this result has not been taken; but it must be borne in mind that the right of the purchaser is only to have the taxes chargeable upon the lots purchased by him, paid out of the purchase money due from him for said lots. Hence, the purchaser, Fares, cannot apply the purchase money yet due from him to the master for lots 6, 7 and 8, to the taxes on lots 16 and 17, purchased by him from Gen. Pillow, out of court. And for the same reason, the purchaser, Hill, is entitled to no decree against Harris & Pillow. The notes taken out by Gen. Pillow did not include either of the notes of Hill, nor does it appear that Gen. Pillow received any money paid in by Hill. The decree in this respect should, therefore, at all events, be modified.

From what has already been said, it follows that the court has the power to compel the return of so much of the fund as may be necessary to do justice between the solicitors. We do not mean to disturb

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the amount fixed as the fee of Messrs. Harris & Pillow. This is a matter between them and their client, which it has not been appealed from. But the lien declared by this court being jointly in favor of the two firms, gave to each a right which they may have adjusted between themselves, and enforced according to the rights as settled, and the court will not permit either to appropriate the whole. It appearing that after paying the taxes and costs, a sufficient sum is not left to pay both, the lien should be so enforced in their favor *pro rata*.

It is not insisted that the decree of Humes & Scott is erroneous in amount. But the remaining question is, whether upon the facts stated, Harris is liable for the money improperly received by Pillow. It has been stated that the partnership between Harris & Pillow had been dissolved some time previous to these transactions; and that Harris did not participate in the transaction or have any knowledge in regard to it, nor did he receive any part of the money, and moreover, Pillow was indebted to him on their partnership accounts.

It will be readily conceded, that after dissolution Pillow had no right to create any obligation on Harris by contract for the creation of a debt. For that matter, we presume that even before dissolution, one partner of a law firm would have no power to create a debt obligatory upon his co-partner, in the absence of express authority, unless it be for the ordinary expenses of a law office, or possibly for books. This, for the reason that the scope of a partnership for

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the practice of law does not contemplate the purchase of other property, or the transaction of such business as makes it necessary to create debts. So that no liability could attach to Harris upon the ground that Pillow was authorized to create a debt in the name of a firm. We take it, however, to be the settled law, that upon dissolution, unless otherwise stipulated, either partner may proceed in the name of the firm to settle and agree with the debtor upon the amount of any debt due to the firm, and collect the same, and the firm would be as conclusively bound by his acts as if both had joined. We presume further, that upon the dissolution of a law firm, in the absence of an agreement to the contrary, either member may give his his attention to, and in the absence of the other, control any unfinished cases or business in which the firm may have been employed. In fact, in reference to the unfinished business of the firm, the rights, duties and liabilities of the members are the same after dissolution as before, unless changed by agreement. As to such business they are still partners, the dissolution dissolves their connection in respect to after-acquired business. Gen. Pillow had, therefore, the right to settle the amount of the fee due the firm in the case referred to, and collect the same, and Harris would be as conclusively bound by such act as if he had joined therein. It is clear Harris could not disregard the settlement and collection by Pillow and proceed to collect the amount again. So far, therefore, as the acts of Pillow amounted to a settlement and collection of the debt, they were clearly

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obligatory upon both parties. The question is, what is the result when one partner, by inadvertence or otherwise, collect a larger sum than is due, or receives, as in this case, of a fund for their security, more than their just share? Shall the other partner be bound not only to the extent the payment was rightful, but also be liable to refund the money improperly collected without regard to whether or not he has received any part thereof?

To the extent the money received was a payment of a debt due to the firm, the money was in the hands of the firm when paid to either partner. A payment to one is a payment to both. How is it with respect to the excessive or improper collection? Undoubtedly the partner receiving the money is liable to refund. Is the other partner also liable without regard to whether or not he has received his share? The ground upon which one partner is liable for the acts of his co-partner is upon the principle of agency, each is the agent of the other to transact all matters within the scope of the partnership business, and we have seen how far this agency extends, even after dissolution.

Now, suppose an agent receive a sum of money for his principal, inadvertently in excess of the sum he should have received, yet within the scope of his authority. Is the principal liable to refund without regard to whether the agent has accounted to him? Or is the only remedy against the agent? We take it the principal would be liable. As respects third persons, a payment to the agent is a payment to the

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principal. Of course it would be different if the agent act entirely without the scope of his authority or fraudulently.

In the attitude the case stands before us, we must assume that the amount collected by Gen. Pillow was rightfully due to the firm, for the reason that it was ascertained by a decree of the court of which the client had notice, and from which she has not appealed.

It results that in collecting this fee, Gen. Pillow acted within the scope of his authority. Furthermore, a lien had been declared upon the fund for the payment of the fee, and the notes and money were turned over to Gen. Pillow under the order of the court. The payment, therefore, would have been rightful and valid if the other parties having a right to a joint participation in the fund, had not asserted their claim.

If the acts of Gen. Pillow had been positively illegal in the sense that they were in violation of positive law, or if they amounted to intentional fraud upon the rights of the other parties, or personal misconduct upon his own part as a solicitor of the court, then we should hold that in such acts his partner would not be liable. But we see no sufficient ground for such conclusion upon this record.

It was erroneous to turn over the notes to Gen. Pillow before ascertaining the taxes due and the rights of the parties, but it was not in the sense indicated an illegal act upon the part of Gen. Pillow. The fund thus received by him was at once in the hands of the firm, and Gen. Pillow was accountable to his partner for the sum thus received, and could not have

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resisted the claim of the latter for a division upon the ground that too large a sum had been collected. We do not see that it changes the result that the other parties asserted their claim before the fund received was actually divided between the members of the firm of Harris & Pillow, nor is the state of the accounts between them material. The receipt of the notes and money was in the name of the firm, and was an act in which one partner had the right to bind another.

With the modifications hereinbefore indicated, the decree must be affirmed.

Judge TURNEY dissents as to the liability of defendant, Harris.

A. GROTENKEMPER v. W. H. CARVER *et al.*

1. **MARRIED WOMEN.** *Privy examination. Amended certificate.* An amended certificate of probate of the privy examination of a married woman, when properly made under the statute, will have all the force of an original probate, and as between the parties, and volunteers under them, will relate back to the date of the privy examination.
2. **SAME.** *Same.* Such a certificate is not successfully impeached by the testimony of the husband and wife, that the husband remained in the clerk's office while the privy examination was taken, the husband stating that he does not remember whether he was out of hearing or not, and the wife being silent on this point, and saying that she signed the deed and acknowledged it.
3. **MORTGAGE.** *Husband and wife. Husband not agent of. Mortgagee. When.* The payment of a substantial consideration at the time

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a mortgage by husband and wife is made, will constitute the mortgagee a purchaser for value, although a part of the consideration be a pre-existing debt, and, nothing else appearing, the husband cannot be held to be the agent of the mortgagee in procuring the wife to join in the deed.

4. **CHANCERY PLEADINGS AND PRACTICE.** *Evidence that deed was fraudulently signed.* Where, upon bill filed to foreclose a mortgage made by a husband and wife, the wife in her answer and cross-bill only avers generally that she was fraudulently induced to sign the deed, and did so under constraint and duress, without any statement of facts showing fraud, constraint or duress, the unsupported testimony of the husband and wife that she was induced to sign the deed by his threat to kill himself if she did not, would not be sufficient to vitiate the deed.
5. **MARRIED WOMEN.** *Separate estate. Power to mortgage.* A married woman, to whom land has been conveyed "to her sole separate use, and to be held by her free from the debts, liabilities and contracts of her present husband, or any future husband she may have," may mortgage such land for the security of her husband's debts.
6. **SAME.** *Amended certificate of probate. Relates to date of deed.* A person who takes a conveyance from a husband and wife of part of the wife's separate estate, in payment of a pre-existing debt, and with notice of a previous conveyance by them of the same property in mortgage by a deed, the certificate of privy examination of which is defective, but is afterwards amended under the statute, is a volunteer, and cannot resist the claim of the mortgagee.

 FROM SHELBY.

Appeal from the Chancery Court at Memphis. D.
H. POSTON, Sp. Ch.

CRAFT & COOPER for complainant

W. P. WILSON and WEATHERFORD & ESTES for
defendants.

COOPER, J., delivered the opinion of the court.

On December 13, 1865, John A. Sims conveyed

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the land in litigation, lying near Memphis, to Mary A. Carver "to her sole and separate use, and to be held by her free from the debts, liabilities and contracts of her present husband, William H. Carver, or any future husband she may have." On October 20, 1868, Carver and wife conveyed the land to Hamilton J. Miller and William McRoberts, partners in business under the name of Boyle, Miller & Co., in mortgage to secure seven notes of the husband to the firm, of even date, three of them for the sum of \$4166.66 each, at two years, and the other four for \$750 each, payable at six, twelve, eighteen and twenty-four months respectively. The mortgagees were merchants at Cincinnati, Ohio, and William H. Carver, the husband, was doing business at Memphis, Tennessee. The consideration of the notes consisted of an account for goods previously sold to Carver by Boyle, Miller & Co., including interest at the rate of ten per cent per annum, amounting to \$4713.30; of goods sold and delivered at the time of the value of \$1496.89; of goods to be delivered after the execution of the mortgage to the value of \$6289.81; and \$3.000 interest for two years on the debt at the rate of twelve per cent per annum, the last four notes being for the interest.

The contract was made by the husband alone with the mortgagees at Cincinnati, and the mortgage was prepared at place by filling up the printed form of such an instrument, having attached to it a printed form for the probate of a deed of a husband and wife, such as is required by the laws of the State of

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Ohio. This form differs in some essential particulars from the form prescribed by our statutes for a similar instrument. The deed was brought to Memphis by Carver, and there executed and acknowledged by them before the clerk of the county court, who filled up the printed form of certificate attached to the deed. The instrument was then registered, and sent by mail to the mortgagees. And the mortgagees afterwards, before the maturity of the notes, assigned the notes to the complainant, Grotenkemper, in payment of a debt due by them to him.

On July 19, 1872, the original bill in this cause was filed to foreclose the mortgage. Carver and wife demurred to the bill, assigning as causes of demurrer that the clerk's certificate of the acknowledgment by them of the execution of the deed, failed to show that the clerk was personally acquainted with the bargainors, or that the wife was privily examined. The chancellor sustained the demurrer and dismissed the bill as to the wife. On July 2, 1875, the suit still pending, the complainant filed an amended and supplemental bill against Carver and wife, based upon an amended probate, and re-registration of the mortgage deed, the amendment having been made on the 6th of June, 1874. The amendment was held to be good, and the bill sustained by this court: *Grotenkemper v. Carver*, 4 Lea, 375.

After the decree sustaining the demurrer to the original bill, and before the amendment of the clerk's certificate, Carver and wife conveyed five acres of the land to Wilson & Beard, the consideration of the

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conveyance being "the fees for services rendered by Wilson & Beard, as solicitors for Mrs. Carver, in the cause." This deed was only proved and registered at the time. Beard afterwards sold and conveyed his interest in the lot to Wilson. And the latter was permitted to become a party defendant to this suit after the filing of the amended and supplemental bill.

In her answer to the bill, Mary A. Carver admits that she, together with her husband, signed the mortgage deed, and with him admitted the fact to some one. "She avers that all that was done at the time was to ask if she signed it, and if she knew its contents." Both in her answer and deposition she says her husband was present, with other persons. She adds in her answer: "That it (the mortgage), was not executed by her freely, voluntarily and understandingly, and without compulsion and constraint by her, but that all that was done was under compulsion and constraint, and that through fear and duress she went with her husband." She says, in another part of her answer, that her husband acted as the agent of the mortgagees in procuring the mortgage, and "that she was fraudulently induced to sign the same." The answer contains no statement of facts tending to show compulsion, constraint or duress, or fraud, by the husband, or any other person, to induce her to execute the deed. By agreement of parties, her answers was treated as a cross-bill for relief upon the matters therein contained considered as denied by answer not under oath. The chancellor, on final hearing, dismissed the bill, and complainant appealed.

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We concur with the chancellor in the conclusion that the amended certificate of the clerk, sustained as it is by the testimony of the clerk, has not been successfully impeached. The existence of the printed form of probate on the mortgage, which does contain the recital of a private examination of the wife, though not in the words of our statute, goes far to explain how the defective certificate happened to be made, and does not tend to show that the actual probate was taken otherwise than in the usual way. The clerk is positive that he took the privy examination in the usual way, the husband retiring from the room. And the amended certificate, without his testimony, would have all the weight, when legally made, of the original probate. There is testimony that the clerk was sued on his official bond for damages for the defective probate about twelve days after he had made the amended certificate, which suit was dismissed in 1880. The proof is made by the clerk himself, who adds that he does not think any threat was made to sue before he made the correction. The only other testimony relied on in defense is that of the husband and wife. They both say that the husband remained in the clerk's office while the acknowledgment of the wife was taken. The husband adds that he does not remember whether he was out of hearing or not, but the fact that he does not contradict the clerk as to the manner in which the wife's privy examination was taken, raises a strong presumption that he was. The wife, in her deposition, says nothing on this point. The evidence falls far short of that

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which is required to impeach the probate: *Shields v. Netherland*, 5 Lea, 193; *Northwestern Mut. Ins. Co. v. Nelson*, 103 U. S., 544.

It is also clear, as held by the chancellor, that the husband cannot be considered as the agent of the mortgagees in procuring his wife's concurrence in the deed. Much the largest part of the consideration secured by the mortgage was new, and passed at the time and on the faith of the security. The rule in such cases is that the payment of a substantial consideration at the time will make the mortgagee a purchaser for value: *Gordon v. English*, 3 Lea, 634. There is not the slightest ground for implicating the mortgagees in any wrongful conduct on the part of the husband: *Shields v. Netherland*, 5 Lea, 199. The answer, as we have seen, does state generally that what was done by the wife was under compulsion and constraint, and through fear and duress, and that she was fraudulently induced to sign the deed. But these are mere conclusions of law, vague generalities, that cannot avail without a statement of facts to sustain them. They neither implicate the husband, nor any one else. When fraud is relied on, the facts upon which the charge is grounded must be stated and proved: *Raht v. Mining Co.*, 5 Lea, 18; *Fort v. Orndorff*, 7 Heis., 167. The only evidence offered to sustain even the allegations, is the testimony of the husband and wife, that she was induced to sign the deed by the threat of the husband to kill himself, if she did not. The chancellor excluded the testimony as falling within the exception of confidential commu-

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nications between husband and wife; which are not allowed to be introduced as evidence on grounds of public policy, and by the act of 1879, ch. 200. It is unnecessary to decide the point, for the court concurs in the opinion that the unsupported testimony of the husband and wife would, under the circumstances, be insufficient to sustain the defense.

The land in controversy, it will be remembered, was conveyed to Mary A. Carver "to her sole and separate use, and to be held by her free from the debts, liabilities and contracts of her present husband, William H. Carver, or any future husband she may have." His Honor, the chancellor, was of opinion that these words operated as a limitation of the power of the wife over the separate estate, and prevented her from charging the property for her husband's debts. The reason he gives is that, since the act of 1849-50, Code, 2481, the husband could not charge the estate by any act of his; that these words of the deed create the separate estate, and that the court cannot presume that the grantor was ignorant of the statute, and used the language without a purpose. We are unable to concur in this view. The act of 1849 was intended to protect the husband's interest in the wife's general property, not her separate estate, from the husband's debts, or from sale by him, unless she joined in the conveyance. Her separate estate needed no such protection, for it could not be charged without her consent either for or by him. The words "to her sole and separate use" were sufficient to create a separate estate, and the residue of the sentence, by

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being an established legal usage, was intended to make assurance doubly sure, by expressing the grantor's object in a different form. The words are those usually, although unnecessarily, used in such cases: *Malloy v. Clapp*, 2 Lea, 586; *Wood v. Polk*, 12 Heis., 220. They simply fix the tenure of her estate, and do not affect the power of disposition which belongs by law to that estate. It is not denied that the wife may charge her separate estate with the payment of her husband's debts, if there is no limitation in the power of disposition: *Parker v. Parker*, 4 Lea, 392.

Wilson & Beard took their conveyance of five acres of the land in controversy in payment of a pre-existing debt for professional services, and are, under our decisions, mere volunteers: *Jarman v. Farley*, 7 Lea, 141. They had notice, moreover, that the complainants claimed under their mortgage, and the equity of that claim, if eventually established, would prevail over the subsequent conveyance: Code, sec. 2074. As between the parties to the mortgage, the privy examination was good, and the amended certificate related back to the date of the acknowledgment: Code, sec. 2072. Besides, the original bill in this case continued in court as to Mary A. Carver, after the demurrer was sustained, certainly for the purpose of appeal, for the complainant could not have appealed from the ruling of the chancellor as of right until the whole case had been disposed of by a final decree; and, perhaps, also for the purpose of amendment. In this view, these parties brought subject to the result of the *lis pendens*.

Harvey & Keith v. Adams.

The chancellor's decree must be reversed, and a decree rendered here in favor of the complainants, subjecting the land to the satisfaction of their demand. The husband has been discharged in bankruptcy, and there will be no personal decree for the debt. The costs will be paid by the complainants, to be reimbursed out of the proceeds of sale.

Judge TURNER dissents from so much of this opinion as holds that the taking of the privy examination of the wife has not been successfully impeached, and that the complainants title is superior to that of the defendant, Wilson.

HARVEY & KEITH v. J. A. ADAMS.

SALE OF LAND. *Under execution.* If a sheriff, under an execution, sells land and it is bid in by a purchaser who fails to pay the money, and he again sells at a less sum to another purchaser, the first purchaser cannot be held liable by the judgment creditor for the difference in the first and last bid.

FROM CARROLL.

Appeal from the Chancery Court at Huntingdon.
JNO. SOMERS, Ch.

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Harvey & Keith v. Adams.

HAWKINS & TOWNES for complainants.

JO. R. & S. W. HAWKINS for defendant.

McFARLAND, J., delivered the opinion of the court.

The bill alleges that complainants obtained judgment at law against the firm of Harris & Barksdale, upon which execution issued and was levied upon certain lands of Harris, one of said firm. After due advertisement and notice the lands were sold by the sheriff and bid off by the defendant Adams, who was the highest and best bidder; but in the language of the bill, he failed and refused to pay the money on his said bids, and still fails and refuses to do so, though often so requested, and though he has repeatedly promised to pay the same. The sheriff returned the execution with an endorsement of the facts thereon, and at the next term the order of sale was duly and regularly renewed by said circuit court, and the land ordered to be sold. The order of sale issued, and the sheriff again advertised and gave notice and sold the lands, the complainants becoming the purchasers at a sum less than the bids of said Adams at the first sale, and less than the amount of complainant's judgment. The complainants notified Adams that they would hold him liable for the difference in the two sales, and he also had notice of the time and place of the second sale. The complainants file this bill to recover of Adams the difference between the two sales. The chancellor sustained a demurrer and dismissed the bill. We think his decree is correct.

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We do not place the decision upon the ground that a tender of a deed or certificate of the sale by the sheriff is essential to the validity of the sale, as such sales are not within the statute of frauds: *Nichol v. Ridley*, 5 Yer., 63. See, also, Code, sec. 3056.

We may further concede that the sale is complete when the bid is accepted and the term agreed upon, as in the sale of chattels. In the sale of personal chattels by one individual to another, if the purchaser refuse to accept and pay for the chattels, the seller has the option to sue and recover the price stipulated, or he may give the purchaser notice of his intention to re-sell, and if within a reasonable time the purchaser does not receive and pay for the goods, the seller is not bound to keep them to his own injury, but may re-sell, and the purchaser will be presumed to have attended to the sale and to have given the seller authority to sell as his agent, and in such case the seller may recover the difference in the proceeds of the two sales: *Williams v. Godwin*, 4 Sneed, 556; *McClure v. Crozier & Williams*, 5 Sneed, 718. But we think these authorities do not sustain the present demand.

In the first place, there is no privity of contract between the complainants and the defendant. The defendant's contract was with the sheriff, and the liability to him. If the sheriff had chosen to return the sale as complete and accepted the defendant's promise to pay the money, an action could no doubt have been maintained by the sheriff against the defendant. The sheriff would have been personally liable for the amount of the bid. Or if the complainants, as execution cred-

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itors, had accepted the promise of the defendant in lieu of the money from the sheriff, then they could no doubt have maintained their action. But in the absence of any arrangement of this sort, the right of the complainants, if any, must be through the sheriff: See *Roberts v. Westbrook*, 1 Cold., 115. In that case, the property (a slave) was sold by the officer, but the purchaser refused to pay the money, and the sheriff at once re-sold for a less sum. The action was by the execution debtor to hold the officer liable for the difference, upon the ground that he was selling as the agent of the parties, and should have compelled the first purchaser to pay his bid. But the court held that the officer was not the agent of the parties, but the officer of the law, and had strictly observed his duty and was hence not liable. The court said that if the refusal of the purchaser to pay his bid was a legal wrong to the execution debtor, inasmuch as there was no privity between him and the purchaser, the remedy, if any, should be sought through the officer. "But," say the court, "we are not prepared to admit that the execution debtor, even in this mode, could entitle himself to any redress," and add, that the principle applicable to commercial sales of goods between individuals, namely, that where the sale is complete, and the purchaser refuse to accept and pay for the goods, they may be re-sold and the purchaser held liable for the difference, does not apply to execution sales.

We take it to be clear that the execution creditor, in a case like this, could have no more right than

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the execution debtor, in a case where, as in *Roberts v. Westbrook*, the last sale was sufficient to satisfy the execution.

The second sale in this case, according to the allegations of the bill, was a sale under process for the satisfaction of the complainants' judgment against the execution debtor, precisely a similar sale to the first—the land was sold as the property of the execution debtor to satisfy the complainants' judgment against him. There was no authority for the officer to make this sale as the agent of the defendant, nor was the sale made under any such assumption. The sale was, therefore, in effect a waiver and abandonment of the first sale.

It probably results from this, that unless the sheriff, either with or without the authority of the execution creditor, chooses to accept the bid and promise of the first purchaser as an absolute sale, or the creditor accept such promise in lieu of money, there is no remedy. As we have seen, the sheriff is not liable for failing to do so. He is in the strict line of his duty to re-sell at once. If the creditor acquiesce in this, there is probably no remedy. But at all events, we hold that the present bill makes no case for relief,

And the decree will be affirmed with costs.

Vosse v. Memphis.

M. VOSSE *et al.* v. THE CITY OF MEMPHIS.

CORPORATIONS, MUNICIPAL. *Ordinances. Classifications of privileges.* By the charter of the city of Memphis, the general council was authorized to establish and regulate market-houses and to license and regulate all mercantile houses and fresh meat stores. Under ordinances of the city, market-houses were established. Persons selling in market-house were only required to pay rent for stalls and not required to pay license. By another ordinance it was required that all persons keeping "meat stores," for sale of fresh meat, not at market-houses, shall pay a license of one hundred dollars, and said persons so licensed shall not sell game, fish, vegetables and other articles of merchandise; no such store to be opened within one quarter of a mile of the market-houses. By another ordinance it was required that a license of fifty dollars be required by any keeper of a game or fish store. By another ordinance it is provided that any merchant regularly licensed shall be permitted to sell fresh meat from store in not less quantities than one quarter of any slaughtered animal, without other license. *Held*, that "meat stores" includes all sorts of meats, whether fish, flesh or fowl, and that the city council had no authority to make the selling of game and fish a separate privilege. The other ordinances were authorized. They are but a classification of the meat dealers with a license tax different in amount for one class than for the other, and properly graded by amount required to be sold.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

W. M. RANDOLPH for complainants.

————— for defendants.

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FREEMAN, J., delivered the opinion of the court.

This is a bill filed by about fifty parties, engaged in the business of selling fresh meats, at places other than the market houses within the city of Memphis, some of them selling, in addition to ordinary meats, game, fish, poultry and vegetables, or some one or more of these articles. They are all, or nearly all, butchers, holding license from the State and county, authorizing them to exercise this privilege. This is the character of their occupations, as stated in the bill, and conceded in the agreed state of facts in the record.

They are, most of them, men of small capital, only a few having as much as one thousand dollars employed in their respective businesses—some have more than this sum, however.

The city passed an ordinance, which, among other things, in sec. 311, under title, "Meat Stores," required that "each person or firm, for the privilege of keeping a store for the sale of fresh meat at any other place than at either of the market-houses, shall pay one hundred dollars per annum, and said privilege or license shall not authorize the sale, by such person or firm, of fish, game, vegetables, or other articles of merchandise, and all licenses issued under this ordinance shall terminate on 30th of September after issuance."

By the next section, no new store for sale of fresh meats was to be opened within one-fourth of a mile, by the line of the streets, of either market-house, nor any one permitted to be continued within the above distance; and by the next section, "all stores where

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fresh meat, fish, game or vegetables are sold, shall be subject to inspection by the market-master, or on complaint of any citizen. The penalties are then prescribed for violating any of the provisions of this ordinance, "by selling fresh meat, fish, game or vegetables, without having obtained the license required, the party being liable for each offense, and for each day's neglect or refusal to take out the license."

By the city charter, the general council is authorized, among many other powers conferred, "to license and regulate all mercantile houses, fresh meat stores, etc.

These ordinances seem to have been passed in 1875. After this, in 1876, another ordinance was passed, requiring a license, and payment of \$50 per annum for the same, by any keeper of a game or fish store.

The bill seeks to have this ordinance declared void, on the ground mainly that it is oppressive and unjustly discriminates between the business of complainants and other merchants or dealers in fresh meats, such as the commission merchant and other merchants of the city, who sell by the quarter, and at most only pay \$25 for their privilege, and may in a certain contingency pay less; and also, that butchers selling in the market-houses of the city, required to rent stalls from the city, for which they pay one hundred dollars per annum, are not required to take out or pay for any license for this privilege at all.

It is also insisted, that the privilege of exercising the business of a butcher, and of keeping a meat store, were intended to be embraced in the same privilege, or make but one.

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There are other matters involved in the case that may be noticed in this place, such as the question as to whether game, dressed poultry, and vegetables, are properly made a separate privilege, or are authorized to be treated as such by the corporation.

As to the question of jurisdiction of the court to enjoin the collection of an illegal tax, as is sought in this case, we need but say here, that there is no demurrer to the bill, and if the party has a right, it not being one of the inhibited questions found in the act of 1873, giving the chancery court extended jurisdiction, the question is not raised on the record so as to be necessarily decided. However, we may say, on the ground that a right is asserted for which there is evidently no adequate remedy at law, and great mischief to the parties, besides greatly increased litigation, therefore the remedy seems not only well chosen, but the most appropriate remedy that could be had.

It is settled by our decisions, that the power to tax an occupation as a privilege, by a municipal corporation, is to be exercised by virtue of the powers conferred in the charter: 2 Head, 367; 1 Hum., 239-40. It is also settled, that in regard to privileges, they are not confined in taxing privileges to the same rules or to the same amount of taxation as the State shall prescribe for its own taxation in such cases; but the power being conferred, the mode of its exercise is left largely to the sound discretion of the governing body: 2 Head, 366.

It has also been held, and correctly, that "these bodies have no power to create a privilege for the

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purpose of taxing it, or to discriminate between persons exercising the same privilege, by imposing a tax on one class at a higher rate or in a different mode, or upon other principles, than are applicable to the exercise of the same privilege by others."—that is, of the same class: *Mayor and City Council of Nashville v. Althrop*, 5 Cold., 558–9. We have added, that is of the same class, in view of the cases of *State v. Schlier*, 8 Heis., 455, and a case at Nashville, last term, in which it was held that the Legislature might classify the same occupations in proportion to the amount of their business, based on the number of inhabitants in the town, or number of rooms in a hotel, and graduate the tax on this basis.

The rule is qualified correctly, or stated with proper limitations in the case in 5th Coldwell, 559, quoting from *Cooly's Const. Lim.*, 390, as follows: "A statute would be unconstitutional, which should proscribe a class or a party, for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt." In that case the party was liable to be taxed as a merchant, was included in that class of privileges, but a special tax on the avocation of selling by samples by non-residents of the city. This was held void for the reason given above. The question is, whether under these principles, the claim of complainants can be sustained.

The chancellor held correctly, as we think, as to

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the power to create the privilege of keeping a game or fish store, and that this was unauthorized, as a separate privilege, and also as to poultry. No such special privilege is authorized or created by the Legislature, and the city had no power to create such a privilege for the purpose of taxing it. Besides, a "meat store" may well be held to include all sorts of meats, whether fish, flesh or fowl, that is consumed by the citizen as food.

The question is, however, whether there is such a discrimination, injuriously affecting the rights of these parties, as between them and other like dealers, or dealers of the same class, as renders the ordinance obnoxious to the principles we have stated?

The first matter is, whether this discrimination is found as between parties who sell meat in the market-house stalls and who pay no license tax as such, but only pay one hundred dollars' rent for the stall.

That the corporation has "the power to establish and regulate market-houses," in the language of the charter, and as a matter of course, could authorize parties to sell in such market-houses on such terms as may be deemed proper, is clear. This business is authorized as an independent subject by the terms of the charter. It does not, then, belong to, nor is it included in the other class of privileges authorized to be taxed, that is, "truly meat stores," in sec. 55, of the charter. The mode of taxing these last cannot be held to be subject to comparison with the business done at the market-houses, for the purpose of showing a discrimination as between the two. They belong to

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different classes of objects and have no necessary connection with each other. Each is an independent subject of regulation, and liable to its own burdens, when properly imposed by law. Besides, it may well be held, that the rent of the stalls, at \$100 per annum, was but a different mode of collecting revenue, from that of a license, but substantially the same thing in principle; at any rate, it is certain that the two things do not admit of being classified together, so that any regulation of the one could have any possible bearing upon the amount of taxation with which the other privilege should be burdened. The power to establish and regulate market-houses, given in the charter, involves, as a corollary, the use of such houses in the mode the nature of the thing authorized is usually used, and for the purposes to which such houses are adapted. Persons to sell and carry on the usual business of such houses are necessarily implied, and the terms on which they shall use the house are matters for the discretion of the governing body of the corporation. These terms have no necessary relation with the exercise of other taxable privileges.

But a more difficult question is presented in the provisions of this ordinance, sec. 315, that "any merchant or commission merchant, regularly licensed under ordinances of the city, shall be permitted to sell fresh meat from store without obtaining special license therefor; *provided*, that no such merchant or commission merchant shall cut or reduce the bulk of any piece of fresh meat, or shall permit the same to be done for purposes of sale, or the convenience of purchasers,

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while the same is in his store or under his control; and *provided further*, that in no case shall any merchant or commission merchant sell fresh meat in any smaller quantity than one quarter of any slaughtered animal."

Both these sellers are included by the ordinance in the same chapter, under the title of "meat stores." This last section gives the privilege to any merchant or commission merchant, in fact, by virtue of his license as a merchant—an independent and different privilege—to engage in the sale of meat, provided such merchants sell not less than a quarter of an animal at a sale. In other words, it allows the merchant's license to cover the sales of meat, when sold by the quantity stated, while the parties complainant who sell meat as an exclusive business are required to pay one hundred dollars for the exercise of the privilege.

The majority of the court, with whom I do not concur, are of the opinion that this is but a classification of the dealers, with a license tax different in amount for one class than for the other, and properly graded by the amount required to be sold. They hold that the city authorities have the power to classify and proportion the tax according to such classification, and that this has been properly done in this case.

It is assumed that the city authorities may be safely trusted to properly adjust and regulate such matters, and ought not to be interfered with by the courts, without a clear case of violation of the rights of the citizen, and that this is not such a case.

The result is, that the decree of the chancellor must be affirmed.

McGowan v. Tally.

McGOWAN, Trustee, v. TALLY.

SUMMARY PROCEEDINGS. *Motion by trustee against officer for revenue.* A clerk in the office of the trustee, upon a settlement with an officer for unpaid taxes, makes a mistake, giving a receipt for a larger sum than he had really collected, but for the sum the officer really owed, and upon balancing his cash account afterwards, he discovered the mistake and makes good the sum to the trustee out of his own funds. *Held*, the trustee cannot maintain a motion under the act of 1875 against the officer for such unpaid revenue. The amount due from the officer is due the clerk and not to the trustee.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

FINLAY & PETERS for Tally.

ATTORNEY-GENERAL LEA for Trustee.

FREEMAN, J., delivered the opinion of the court.

This is a motion made by plaintiff, as trustee of Shelby county, against defendant, a constable who had received a list of unpaid taxes in his civil district for collection, and who is alleged to have failed to pay over \$100 of the money collected by him.

The collector has received and paid over the sum in contest, as hereinafter stated, and brings this motion under chap. xcl., acts of 1875, sec. 17, which is as

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follows: "Be it further enacted, that the motion given against the sheriffs in this act on their bonds may be made by the trustee, in case he has to account for any tax justly due from the sheriff or constable."

The facts under which the payment of the money was made by the trustee, are seen from the following statement of the case found in this record:

Tally went to the office of the trustee in Memphis, on the 30th of November, 1881, to settle and pay over moneys by him collected. The amount was \$376.30, as shown by his report. Several credits were to be allowed, to fix the precise sum of money to be paid—after deducting these, the amount of money was \$342.91, as shown by a statement in the record. On the part of the trustee it is claimed, that there was a mistake made in the figures in arriving at the proper sum to be paid, in subtracting from the sum of \$376.30 a credit of \$3.65, due for commissions, so that instead of \$372.65, the result was made \$272.65, and from this sum was then taken the other credit of \$29.91, thus making a difference of one hundred dollars, and that the constable then only paid this sum so ascertained, and got a receipt in full for the \$376.30, by paying the amount given by the erroneous figuring of the clerk, Lemaster, who made the settlement. This clerk says, on counting his cash in the evening, he found his cash short \$100, and finding next day in his blotter the paper containing the figures, plainly showing where the error occurred, he notified the constable of it, and sought a correction. In the meantime, as he was the money clerk, and responsible for

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the cash account, and attended to the settlement alone, he put \$100 of his own money in the cash drawer and handed it over to McGowan, the trustee, who knew nothing of the matter, and so the proper sum has gone into the county treasury—the clerk having paid the shortage in his own account out of his own money, the trustee never having paid anything, or been compelled to account for any tax due from the constable at all.

Now, an angry and earnest contest, and one in which there is, to say the least of it, much difficulty in deciding, is found in this record, between the clerk and Tally, as to which in fact made the mistake, or whether Tally did not in fact pay over the true amount, and the shortage occur in some other way than as stated. On this question both parties swear as positively and definitely to their respective views as can be, and the constable is shown to be of good character and reputation both for veracity and integrity.

The first question is, whether this is a case where a motion will lie under the above section of the act of 1875?

While we could not adhere to the ancient strictness, perhaps, of our earlier decisions literally in reference to summary proceedings, still we ought not to extend such a statutory remedy beyond the fair meaning of the terms used in the statute. The object of the statute was to give the trustees the remedy to which the tax collector under the former system had been entitled, in case he had to account for any tax which the sheriff or constable was due to him. It was to

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enable the trustee to reimburse himself, when he had been compelled or held liable to pay and had paid. Now, in this case the trustee has not paid anything for the constable, or accounted for anything for him. The clerk, who was compelled to account for all moneys received by him to his employer, the trustee, has found on his theory that his accounts were short, and he has made good his own account by paying the deficit himself out of his own money, and as the proof shows, looked to the constable to reimburse him. The money was paid by the clerk in settlement of his own account. He has been compelled to pay to the trustee what the constable ought to have paid him—if his theory be correct—the trustee has not been compelled to pay anything. He has only received from his clerk the \$100 which the clerk should have received, and says he did not because of the alleged mistake. This is not within the language of the statute—is not the case provided for, and we cannot extend the remedy beyond what the statute has provided.

Should McGowan recover in this case, it is not for his reimbursement, but for that of his clerk. He will in fact be bound in justice to pay the money over to him—certainly would have no legal right to it. If he should retain it he will have made this much clear, to which he is not entitled. If he is not entitled to the money when recovered, we certainly cannot be expected, under the most liberal rule applicable to summary proceeding, to allow him to use the statutory remedy to enforce the rights of another party,

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who happened to be his clerk. This fact no more entitles the clerk to this remedy, than if the employee had been the trustee's boot-black, or in his service for any other purpose.

E. J. DOOLEY v. MRS. M. J. DOOLEY.

ATTORNEYS. *Powers of.* Mrs. D sued D in replevin for sixty hogs. The suit was compromised. D was to have the hogs if he paid Mrs. D. fifty dollars November 1, 1878, otherwise the hogs were to belong to Mrs. D. Mr. G was the attorney of Mrs. D in the replevin suit. On November 1, D paid Greer fifty dollars. When Mrs. D some days after was informed of the payment, she denied his authority to receive the amount, and declined to take it when offered. *Held*, she could maintain an action of replevin for the hogs. Although Greer acted as her counsel in the case compromised, he had no right, without special authority, to accept the fifty dollars.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

J. M. GREER for E. J. Dooley.

HUMES & POSTON for M. J. Dooley.

Dooley v. Dooley.

DEADERICK, C. J., delivered the opinion of the court.

Mrs. Dooley instituted this suit in replevin, before a justice of the peace. Before trial, by consent, the property sued for (60 hogs) not having been found, the action was changed to detinue, and judgment rendered in favor of defendant; from which plaintiff below appealed to the circuit court. There, upon trial, judgment was rendered in favor of Mrs. Dooley for the property, valued at \$100, and defendant appealed.

It appears from the bill of exceptions, that Mrs. Dooley had previously sued defendant for the same hogs, and that the suit had been compromised, each party paying one-half the costs, and that E. J. Dooley was to have the hogs, if he paid Mrs. Dooley \$50 on the first day of November, 1878, but if he failed to do so, then said E. J. was to deliver them to Mrs. Dooley, whose property they were admitted to be.

This agreement was written out and signed by the parties and delivered to Mrs. Dooley. Mr. Greer had been her counsel in the cause which was compromised, and on the day the \$50 was payable, E. J. Dooley paid the amount to said Greer.

Some days after the 1st of November, Mrs. Dooley was informed by Mr. Greer that the \$50 had been paid to him, but she denied his authority to receive it, and declined to take it when offered to her.

The defense is, to this action, that Greer having acted as her counsel and attorney in the case which

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was compromised, had the right, without any special authority from her, to accept the \$50. We think he had not such right. The litigation in which he acted as attorney had terminated, and Mrs. Dooley had received E. J. Dooley's obligation to pay her \$50 on the 1st of November or to return the hogs.

In respect to the collection of this \$50 or the enforcement of this new undertaking, Greer was not employed as attorney. He had, therefore, no legal right to receive the money, or to acquit E. J. Dooley of his liability to Mrs. Dooley, although he evidently acted in good faith, and under the impression that as he had been employed in the litigation which resulted in the compromise, and had acted as her counsel in that case and in other cases, that he might properly receive the amount tendered.

E. J. having failed to pay the money to Mrs. Dooley, or to any one authorized to receive it for her, at the time stipulated, she had a right to demand and sue for the hogs.

The judgment of the circuit court must be affirmed.

Dinwiddie v. Railroad.

W. M. DINWIDDIE, Adm'r, v. LOUISVILLE & NASHVILLE
RAILROAD COMPANY.

1. SUPREME COURT PRACTICE. *Bill of exceptions.* An affidavit that there was not kept by the clerk a jury and non-jury docket cannot be looked to. It should appear from the statement of the presiding judge as a part of the bill of exceptions.
2. RAILROADS. *Statutory regulations.* The statute requires, when obstructions appear upon the road, that the *alarm* whistle should be sounded but does not specify the number or character of whistles, and the question is reserved whether if an engineer sounded for brakes, that would be a compliance with the statute.
3. SAME. *Same.* The statute does not specify the number of brakemen there shall be upon the train. This is a regulation left to the railroad company, which must be reasonable and in conformity with general usage and the course of business of railroads. To require one brakeman to each car is unreasonable.

FROM HENRY.

Appeal in error from the Circuit Court of Henry county. C. ADEN, J.

J. N. THOMASON for Dinwiddie.

COLE & SWEENEY for Railroad Company.

McFARLAND, J., delivered the opinion of the court.

This action was brought by the administrator of Felix R. Hagler, deceased, for the use of his next of kin, to recover damages for injuries by the railroad

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company causing Hagler's death. The cause was tried by the judge without a jury, and the issue upon the plea of not guilty found in favor of the defendant, and judgment rendered accordingly. The plaintiff moved for a new trial, which was refused. He thereupon took a bill of exceptions, setting forth the evidence heard upon the trial and appealed in error.

The first ground of error assigned is the action of the court in trying the cause without a jury. The plaintiff's declaration was filed the 28th of May, 1879, and his replication to the defendant's plea on the 3d of June thereafter, and neither contains any demand for a jury. This, according to the terms of the act of 1875—which we have held to be a valid and constitutional regulation of jury trials—was a waiver of the right to a trial by a jury. It is argued, however, that the statute should not have been enforced in this case, for the reason that its requirements in regard to keeping a "jury docket" and a "non-jury docket" had not been complied with by the clerk.

If, however, this would affect the question—as clearly it would not—there is nothing in the record to show the facts assumed. The fact, it is true, is stated in an affidavit copied into the transcript, but the affidavit is not made part of the record by bill of exceptions, and cannot be looked to. Besides, a matter of this sort, when material, should appear from the statement of the presiding judge as part of the bill of exceptions.

We have several times held that we will not look to the affidavits of the parties in regard to facts transpiring in the presence of the court and as part of its

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proceedings, of which the judge may be supposed to be cognizant, unless the bill of exceptions indicates that the judge really intended to certify the facts stated in the affidavit.

All that appears of record on this question, is the plaintiff's motion to transfer the cause to the jury docket, which was entered and refused on the 1st of May, 1880. There is in fact nothing to show that when the cause was tried on the 8th of June, 1880, a jury was demanded.

The next assignment of error is the action of the judge in sustaining the defendant's objection to a question asked by plaintiff's counsel of one of its witnesses to this effect; immediately after Hagler had been run over the train was stopped and the engineer, conductor and other train hands had gathered around the body which was still breathing; the witness was asked, "what statements were made around the body by the operatives of the train as to how the killing occurred." We think it requires neither argument nor authority to show that there is no error in this. It is not shown what statement the plaintiff proposed to prove, and besides it would have been but the declarations of persons not parties to the cause, as to facts which they were competent witnesses to prove, but as to which they could make no admission binding on the defendant.

It is next insisted that the finding of the trial judge is not sustained by the evidence. The fact that Hagler was run over and killed by defendant's train, was not denied. The proof indicates that he was drunk

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and had fallen or lain down upon the track at a late hour in the night and was probably asleep, and in this condition was run over and killed. The finding for the defendant was no doubt upon the ground that the agents and employees of the road had complied with all the requirements of the Code, sec. 1166, which in such cases exonerates the company. It is insisted that the proof fails to show a compliance with the statute in this; the act requires a look-out ahead to be constantly kept * * "and when any person, animal or other obstruction appears upon the road, the *alarm whistle* shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." It is argued that the proof shows that when an obstruction is discovered upon the road, the engineer sounds what is styled a "call for brakes," being either one, two or three short *whistles*, according to the imminence of the danger; and in addition he sounds what is called the "alarm whistle," a series of successive whistles, to alarm or frighten off stock, and the latter duty was not performed in this case, that the engineer only sounded the call for brakes. The statute does not specify the number or character of the whistles; it only says, the "alarm whistle." The call for brakes is, according to the proof, an "alarm whistle." But we need not in this case determine what would be a compliance with the statute in this respect, for the reason that there is proof showing that the engineer "sounded the alarm and called for brakes"—in the language of one witness, "sounded the alarm and called for brakes violently."

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So that even upon the assumption contended for, that the "alarm whistle" means a whistle distinct from a call for brakes, there is proof in the record that the statute was complied with. We need not determine the weight of proof on the question—it is sufficient that there is proof to sustain the verdict.

It is next insisted that the statute was not complied with in regard to brakes; that the train was composed of six freight cars with brakes upon each car, but that there were only three brakemen, whereas with a brakeman upon each car the train could have been stopped sooner. The proof is that there was the usual number, and considered sufficient for any train. The statute does not specify the number of brakemen, and we are of opinion that this is one of the regulations that must be left to the railroad companies, provided their regulations are reasonable and in conformity with the general usage and course of business of railroads, and are such as contemplate a compliance with the statute according to its fair import and meaning. To require one brakeman to each car, would be so contrary to all usage in this respect, and so unreasonable in itself, as to make it reasonably certain that the legislature did not intend to impose any such requirement.

There is no error in the record, and the judgment will be affirmed.

Mississippi Mills v. Bank.

**MISSISSIPPI MILLS v. UNION AND PLANTERS BANK OF
MEMPHIS.**

SALE OF PERSONAL PROPERTY. *Stoppage in transitu. Rights of seller and attaching creditors.* Goods which have been sold but have not gone into the possession of the buyer who is insolvent, may be reclaimed by the seller for his own indemnity, and this right of reclamation he may exercise notwithstanding the goods may have been seized by execution or attachment by creditors of the buyer.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

B. J. KIMBROUGH for Mills.

JARNAGIN & FRAYSER and GREER & ADAMS for Bank.

DEADERICK, C. J., delivered the opinion of the court.

This is an action of replevin brought by the plaintiff against the defendant, to recover goods valued at \$150, which the plaintiff had sold Williford & Anderson, and the bank as their creditor had attached, before their delivery to the purchasers.

The facts were agreed upon and the cause was tried by the circuit judge without a jury, a judgment rendered in favor of defendant, and plaintiff appealed.

The facts agreed upon are as follows:

1. Plaintiff, on the 20th of January, 1880, shipped to Williford & Anderson, merchants at Bartlett, Ten-

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nessee, four coils of rope and one bale of cottonades. Plaintiff then did not know of the insolvent condition of Williford & Anderson.

2. Contents of letter to counsel, enclosing postal card, including said postal card sent by W. & A. to plaintiff, were also admitted as evidence.

3. Plaintiff knew nothing of assignment made by W. & A. until he received telegram marked T, which was received subsequently to the levy of defendant's attachment.

4. The only order countermanding the shipment of the goods by W. & A., was such as was contained in their postal card of 16th.

5. On the 27th of January, 1880, when W. & A. made their assignment, they were indebted to the bank in the sum of \$237.75, and the bank on the 29th of January, 1880, issued an ancillary attachment, which was regular and valid, which was levied on the goods in question on the next day (30th January), and judgment was rendered in favor of the bank by a justice of said Shelby county, against W. & A. for \$237.75, which is unappealed from and is still in force.

6. It was also admitted, that on the trial of this case before the justice, S. P. Williford said that he did not say on the the trial against him, that he ought to have advised the plaintiff that he and Anderson had made an assignment, and to stop their goods, and he must now go and telegraph them to that effect, and that Jno. Blackwell and Jno. McBrooks testified he did make such a statement. The telegram marked T was sent to plaintiff by W. & A.

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7. The plaintiff first made effort to stop the goods *in transitu*, on February 2d, 1880, and after the officer had taken possession of them.

8. The goods came to the depot in Bartlett by rail on the 29th of January, 1880, consigned to W. & A., but they never took actual possession of them.

9. When levied on by the attachment, the goods were in the railroad depot in Bartlett.

10. The goods were agreed to be worth \$150. The goods were sold on a credit of sixty days by plaintiff to W. & A.

A copy of the telegram T, and a copy of assignment of W. & A. were in evidence; and lastly, it was agreed that the railroad agent was not in the habit of notifying consignees of the arrival of goods.

The material facts admitted by the agreement of counsel are, that plaintiff sold a bill of goods to W. & A., on their order, and before he had sent them, received a postal card, dated 16th January, requesting that he should not send the goods until the 1st of February. By inadvertence the goods were sent before that time, and attached on the 30th of January, while in the railroad depot; that they never were in the actual possession of the consignees, and were attached while still in the railroad depot, 30th of January, and replevied by the vendor on the 4th of February; and that W. & A. were insolvent.

The controlling question in the case is, had plaintiff, upon the facts admitted, lost the right of stoppage *in transitu*?

It is insisted for defendants, that admitting there

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was no actual possession of the goods by W. & A., still the levy of the attachment terminated such right, and the case of *Boyd v. Mosley*, 2 Swan, 661, is relied upon to sustain this position.

By an examination of the 2 Swan case, it will appear that it was not a case raising the question of the right of stoppage *in transitu*, and therefore a mere dictum, as correctly said by Mr. King in his Digest, vol. 3, sec. 5788, sub-sec. 4.

This right of stoppage *in transitu* arises solely upon the insolvency of the buyer: Benj. on Sales, secs. 828, 837. It does not exist against a solvent purchaser. In the 2 Swan case it was correctly held by this court, where goods were ordered and placed on the wagon of a common carrier directed to the purchaser, in accordance with his directions, that the delivery to the carrier was a delivery to the buyer, and the property vested in him, and might be legally attached for his, the buyer's, debt.

The seller had replevied the goods and his claim was urged upon the ground: 1. That the delivery was not complete. 2. That he had a lien upon the goods until the price was paid. Both these claims were decided adversely to him, and his Honor, Judge Totten, proceeded to say: "By this delivery (to the carrier) the property becomes vested in the buyer, subject only to the seller's right of stoppage *in transitu*, which is an equitable right not inconsistent with the former; it consists in reserving the possession of the goods while *in transitu* and retaining them until the price be paid." "But," he adds, "this right is gone, if

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other *bona fide* rights intervene, before it be exercised; as if the buyer sell the goods, or they be legally attached for debt, as in the present case."

There is not only no statement in the opinion in that case that the buyer was insolvent, but it is stated that plaintiff had "full confidence in the credit and solvency of the buyer. The case was, therefore, wanting in the element of the insolvency of the buyer, to bring it within the principles of law conferring upon the vendor the right of stoppage *in transitu*. But as before stated, the case was correctly decided upon the ground that the sale and delivery to the carrier was a delivery to the buyer: Ang. on C., sec. 497; Benj. on Sales, secs. 3, 308, 675, 840.

But if the goods have not gone into the actual possession of the buyer, and he has not made a *bona fide* sale of them, and he be insolvent, the seller may reclaim them for his own indemnity: Benj. on Sales, secs. 675, 677, 840; 5 Wait's Action & Def., 611. And this right of reclamation he may exercise, notwithstanding the goods have been seized in execution, or by attachment, by the creditors of the buyer: Benj. on Sales, secs. 832, 836; 5 Wait's A. & D., 616; 50 Mississippi R., 591.

We are of opinion, therefore, that the judgment of the circuit judge was erroneous and will be reversed. The property in question having been delivered to plaintiff on his writ of replevin, he will take his judgment here for costs.

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G. O. BUNTYN *et al.*, Adm'rs of G. Buntyn, dec'd, v.
 GEO. C. & W. R. HOLMES, Adm'rs of Geo. L.
 Holmes, 'dec'd, *et al.*

1. ADMINISTRATOR. *Judgment against. Right of heirs to contest. Technical defenses.* Heirs have the right to make all defenses to a judgment against the administrator when it is sought to subject the land descended to them, but this right does not extend to mere technical objections or irregularities, not going to the question of the liability of ancestor for the debt, sufficiency of assets, or other meritorious defenses.
2. SAME. *Heirs. Estoppel.* If the heirs are the administrators and make an agreement to have the land sold if claimant will allow the issue of fully administered to be found in their favor, they will be estopped as heirs from denying that the lands are liable for the judgment, and from insisting there were sufficient personal effects.
3. ANCESTOR'S LAND. *Alienation by heir.* Where land was mortgaged by heirs and afterwards levied on by their execution creditors and sold, the land may be sold by decree of court to satisfy a judgment against ancestor. An heir has no right to mortgage ancestor's land before payment of the debts, and the sale under execution was invalid, as the legal title was not in the heirs, they having conveyed by trust deed. Secs. 1762, 3, 4 and 5, and Secs. 2253, 2265-6 of Code examined, but the question as to power of heir to sell land descended so as to defeat the collection of ancestor's debt, not determined.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
 W. McDOWELL, Ch.

ESTES & ELLETT for complainants.

GEO. GILLHAM, CRAFT & COOPER and FLIPPIN &
 FLIPPIN for defendants.

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DEADERICK, C. J., delivered the opinion of the court.

The bill is filed to subject certain real estate of Geo. L. Holmes, deceased, which descended to his heirs, Geo. C. and W. R. Holmes, his only heirs at law, and who are also his administrators, to the payment of a judgment at law, recovered by complainants against said administrators of Holmes.

Other parties defendant claim title to parts of said lands by deeds of trust made to secure debts due from the heirs at law, and still others claim title in virtue of execution sales for satisfaction of debts due from the said heirs.

The administrators of Holmes were sued in the circuit court of Shelby county, for a debt due by their ancestor to the intestate of complainants, and judgment was had, and now when they seek to subject the lands descended, they are met by the heirs with the defense that the judgment was irregular and erroneous, because the note sued on belonged to the estate of one Mrs. Titus, and was payable to her, and should have been sued for in the name of her administrator, whereas it was in fact sued for in the name of complainants, administrators, as aforesaid, and judgment rendered in their favor as such administrators.

It is further insisted by said heirs, that at the time of the rendition of said judgment against them as administrators, there were personal assets in their hands sufficient for its satisfaction, notwithstanding the judgment to the contrary. They say that the plea of *plene administravit* was found against them by the jury,

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but that subsequently the said finding and judgment were set aside and vacated, and judgment entered that they had fully administered, etc., as the record shows.

The heirs claim that they are entitled to make all defenses to the claim sued on, when it is sought to subject the land descended to them, that they might have made as administrators. And such seems to be the current of our decisions upon this point. But we do not understand this right to extend to mere technical objections or irregularities, not going to the questions of the liability of the ancestor for the debt sued for, or sufficiency of assets, or other meritorious defense. The statutes intended to protect the heir against fraud and collusion between the creditors and administrator, and to give him an opportunity to show some substantial reason why his lands should not be subjected to the satisfaction of a judgment to which he was no party at the time of its rendition.

In this case it is shown that the administrators of Holmes were his only heirs at law and distributees, and that it was at their request and upon their agreement to sell lands and pay the debt, that plaintiffs consented to a finding and judgment in their favor upon their plea of *plene administravit*. They were the owners of the whole estate, real and personal, of their ancestor, which was charged in their hands with the payment of their intestate's debts. And although, as a general rule, judgments conclude parties in the character in which they are sued, yet upon the facts in this case, we hold that as heirs the defendants, Geo. and W. R. Holmes, are estopped to deny that the

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land in their hands is liable for said debt, for it was by their act and conduct and at their instance, that by said judgment it became liable, if the judgment itself is valid.

Complainants intestate was the administrator of Mrs. Titus, and her sole distributee. He had settled up said estate, and held the note of Holmes, on which the judgment was had, and which was payable to Mrs. Titus. Suit was brought, or about to be brought, in the name of complainants, as G. Buntyn's administrators, but the counsel for defendants took exception to this, and thereupon administration *de bonis non* on Mrs. Titus' estate was taken out; when this was done, counsel for defendants, to save trouble and expense, withdrew the objection. It was in fact more technical than substantial. The beneficial interest in the note belonged to complainants' intestate. No one contested his right to the fund when collected, and although the recovery in the names of complainants was irregular, yet it puts the fund where it belonged, and no one was prejudiced thereby.

It appears from the record, that in March, 1871, W. R. Holmes executed a deed of trust to Stephens, trustee, which on its face recites that it is to secure \$1,140, that day loaned him by Thos. R. Smith, and fees due said Smith and W. H. Stephens for professional services, which fees are all due to said Smith. This trust deed embraces land sought to be reached by this bill.

Pitzer Miller and others obtained judgment at law, executions from which were levied on land previously

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conveyed by said heirs, which were sold under said executions. The chancellor rendered a decree in favor of complainants for \$3,343.15, to be satisfied out of the lands descended to the said heirs of Geo. L. Holmes, giving prior right of satisfaction to one Dohan out of certain land described, and whose claim is not here contested, and declaring that said administrators were entitled to five per cent. commissions on \$9,684.20 of proper disbursements of the personal estate made by them, and that they be also allowed for any advances out of their personal means, and for these sums it was declared said administrators were entitled to satisfaction out of proceeds of sale of lands before complainants.

It was further declared that the execution sales of the land were void and communicated no title to the purchasers, because the legal title was not in the debtors at the time of the sale, and the cross-bills of these creditors were dismissed.

The chancellor then decrees that all of the alienations by the heirs of said Geo. L. Holmes, deceased, except that to Dohan, are invalid as against complainants' claim, the court being of opinion that none of them were *bona fide* alienations as against the claim of complainants. A sale of the land is ordered, and proceeds directed to be applied as hereinbefore indicated.

From this decree three special appeals are prosecuted in this court:

First. Complainants appeal from so much of said decree as allows commissions to said administrators of Holmes, and gives such commissions priority over their claim.

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Second. Geo. C. Holmes and the representatives of his deceased brother, W. R. Holmes, appeal from so much of the decree as allows the debt of complainants, and provides for its satisfaction out of the lands.

Third. Pitzer Miller, and the executor and executrix of Thomas R. Smith, appeal from so much of the decree as allows complainants' claim and dismisses their respective cross-bills, and denying the relief claimed by them.

As already indicated, we are of opinion that the judgment of complainants is valid, and that the heirs of Geo. L. Holmes, deceased, are estopped to deny the truth of the finding and judgment of the court, as to the exhaustion of personalty, by reason of their interference in procuring such finding. And it would be inequitable to allow them as heirs at law to take advantage of their own wrong, to the prejudice of complainants.

The question then is, have complainants' rights and remedies been impaired by the sales under execution to Miller, or the deed of trust to secure Smith?

The sale under Miller's execution conveyed no title, because at the time of judgment and sale, the legal title was not in either Geo. C. or W. R. Holmes, the judgment debtors. It, therefore, was no impediment to the relief sought.

The deed of trust made to secure Smith was made some ten months after the rendition of complainants' judgment. Said Smith having been counsel of said administrators in the suit against them, was informed of all the facts connected with the rendition of said

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judgment, and that it must be satisfied out of the real estate as agreed and understood at the time of its rendition. Beside, although the deed recites that a part of its consideration was advanced at the time of its execution, yet all the evidence upon this point found in the record tends to show that the consideration was in fact pre-existing indebtedness.

By sections 1762, 3, 4 & 5 of the Code, all *devises* of lands, or rents and profits thereof, made to defraud creditors, are made void, and the creditor is given an action against such devisee and heirs of the debtor, just as such action is given against the debtor's heirs at law. And if the devisee "sell, alien, or make over the lands," before action brought, he shall be liable for the value of the lands so "sold, *aliened* or made over, and execution may have." But lands "*bona fide aliened*," before the action brought, shall not be liable to such execution.

These provisions, it is argued, apply only to cases of fraudulent *devises* of lands, etc. And the terms and language of the several sections referred to, sustain this construction.

Sections 2253 and the three succeeding sections, under the head of "Proceedings by Creditor, who is Administrator," prescribe the mode of proceeding by a creditor who is also the administrator, to subject land to payment of debts, where the personal assets are insufficient for that purpose. The last of the three sections cited provides, if an heir or devisee alien the land before action brought, he shall be answerable for the ancestor's debts to the value of the land.

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But it is not provided, as in cases of fraudulent devisees, in express terms, that such land shall not be liable to execution in the hands of a *bona fide* alienee. But, perhaps, as this special remedy against the heir or devisee is given, it would, by fair construction, release the land in the hands of a *bona fide* alienee from liability.

It has been plausibly and ably argued, in construction of these statutes in connection with others upon the same general subject, those in respect to fraudulent devises, being found under the head of void contracts; the others, in relation to the proceedings by a creditor, who is also administrator, that the exemption of the land in the hands of an alienee, is provided, only in the two classes of cases mentioned. And as no such provisions or exemptions are embodied in sec. 2267 (act of 1827) under which this bill was filed, that such lands would be subject under that act to sale, at the suit of the administrator or any *bona fide* creditor in the hands of an alienee of the heir. But as it is not essential to the determination of the questions in this case, we do not decide what are the rights of creditors, in cases of *bona fide* alienation of lands by heirs descended to them.

It will be observed that it is lands, etc. "*bona fide* aliened," which are not liable to execution under sec. 1765 of the Code. And the same term, "alien," is used in sec. 2256. This term implies the absolute divestiture of all title in the grantor and vesting it in the grantee, and also a surrender of the possession of the thing conveyed. See 1 Bur. L. Dic., p. 82-3,

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where it is said "a conveyance by way of mortgage is not an alienation."

A mortgage is a conveyance to secure a debt, leaving the possession with the mortgager, and the right to retain the property upon payment of the debt.

But it appears that Smith had knowledge of the necessity of a sale of the land for the payment of complainant's debt, and that afterwards the deed of trust or mortgage was executed to secure in part, if not in whole, a pre-existing debt. Under these facts we think his claim was properly postponed to that of complainants.

Except for the amount of personal assets, \$9,000 and odd, we think the administrators ought not to be allowed commissions to the prejudice of the complainant's claim, and in this respect the decree will be modified; and no claim for commissions will be allowed, except as above stated.

And with this modification the chancellor's decree will be affirmed, and the costs of this court will be paid out of proceeds of sale of land, and the costs below as adjudged by the chancellor, and the cause will be remanded for further proceedings.

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B. ROCCO v. JOSEPH PARCZYK.

1. PLEADINGS AND PRACTICE AT LAW. *Contract. Charge of court.* If the plaintiff and defendant both testify there was a contract for services, but differ as to amount, it is not error for the court to charge the jury that "if the jury should find there was no contract, they would allow the plaintiff what his services were really worth." The jury might find that there was no contract, the minds of the parties not agreeing to the same stipulations.
2. SAME. *Contract. Wages. Evidence.* It is not error, in a suit for wages per contract, to show in support of plaintiff's understanding of the contract that when he went to work for the defendant, that he was receiving from another person, whom he voluntarily left, a much larger sum than the amount defendant insisted he was to receive.
3. SAME. *Evidence. Contradiction of witnesses as to irrelevant matter.* While great latitude is allowed in cross-examination, yet the answer of a witness cannot be contradicted as to a matter entirely irrelevant to the case.
4. EXECUTION. *Levy. Writ of error and supersedeas. Garnishment.* A levy upon personal property will be discharged by writ of error and supersedeas; so, also, a levy by garnishment.
5. SAME. *Teste.* The relation of the lien of an execution to its teste is a pure fiction of law, and ought not to be indulged further than the courts are bound to go by the well-settled law. The case of *Berry v. Clements*, 9 Hum., approved.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. C. W. HEISKELL, J.

JARNIGAN & FRAYSER for Rocco.

W. M. RANDOLPH for Parczyk.

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McFARLAND, J., delivered the opinion of the court.

This action was commenced by Parczyk to recover wages for services rendered the defendant Rocco, as confectioner and pastry cook, for a period something more than three years. The employment and service were not denied; the controversy was in regard to the wages the plaintiff was to receive. The plaintiff himself testified that the defendant agreed to pay him at the rate of three dollars per day, and supported this theory by the testimony of other witnesses. The defendant and his witnesses testified that the contract price was forty dollars per month. The judge instructed the jury to ascertain from the proof which of these theories was the true one, and make up their verdict accordingly. He further instructed them that if they should find from the testimony that there was no contract, they would allow the plaintiff what his services were reasonably worth. The latter part of the instruction is excepted to, and it is insisted that as both the plaintiff and the defendant testified as witnesses that there was a special contract, the case should have been submitted to the jury to determine the terms of the contract, and that it was error to submit to the jury a theory which both parties repudiated, that is to say, that the services were rendered without any special contract as to the wages to be paid.

It is manifest, however, from the conflict in the testimony, that the jury might well have come to the conclusion that the parties understood the contract dif-

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ferently. While they both testify that the wages were agreed upon, yet in fact they did not agree to the same terms; that the minds of the two parties did not meet and agree to the same stipulations, and hence the services were rendered without the rate of wages being settled by contract; and in such a case it is clear that the plaintiff would be entitled to recover upon a *quantum meruit*. This is the meaning of the charge, and it is clearly correct.

The court permitted the plaintiff to prove, over the defendant's objections, that he was working at the Overton Hotel at \$80 per month, just before he went into the defendant's service, and that he voluntarily left the hotel. The plaintiff gave this as a reason why he did not agree to accept \$40 per month from the defendant. The court told the jury they might look to the fact for that purpose alone in connection with the other testimony, and on rebuttal of this, consider the proof tending to show that the plaintiff was not at the time employed at the Overton Hotel. We think the testimony was not irrelevant. If in fact the plaintiff was receiving for similar services, \$80 per month, the improbability that he would voluntarily quit that service and agree to accept from the defendant half the amount, we think might well be considered by the jury in corroboration of his testimony, that he did not agree to accept that sum. In the conflict between the testimony of the plaintiff and defendant as to the wages actually agreed to be paid, it cannot be said that the fact—if it were a fact—that the plaintiff voluntarily quit a service where

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he was receiving \$80 per month, did not throw light upon the question. And for the same reasons, we think the court did not err in allowing the plaintiff to prove that after he entered the defendant's service he rejected an offer from another party of seventy-five dollars per month.

On the other hand, it is insisted that the court erred in refusing to allow the defendant to prove that the plaintiff, after he left the defendant's service, was employed by other parties at \$40 and \$50 per month. But this was more than three years after the contract in question, and when, so far as appears, wages of this character may have greatly declined. The proof rejected, therefore, did not stand upon the same ground as that admitted in behalf of the plaintiff.

Again. On cross-examination of one Jones, a witness for the plaintiff, he testified that he lived the year before in Mississippi, came back to Memphis Christmas, had a good home there, was not kept there by the plaintiff, brought his cotton from Mississippi, and Tom Fox sold it the 7th day after Christmas. The defendant then proposed to prove by Fox that he had sold no cotton or had any other dealing with the witness at any time, but upon objection the testimony was excluded. The ruling was correct, upon the familiar rule that while great latitude is allowed upon cross-examination, yet the answer of the witness cannot be contradicted as to a matter entirely irrelevant to the issue in the case. To allow such contradictions would multiply collateral issues indefinitely.

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Other exceptions were taken to the rulings upon questions of testimony, but we are of opinion that there is no reversible error in the record, and the judgment will be affirmed.

The record presents another question upon the appeal of the plaintiff. The judgment was rendered on the 28th of February, 1878. Under a statute applicable to courts at Memphis, where the terms continue several months, an execution issued on the 17th of April, while the term was still continuing. This execution was tested of the third Monday in January, the beginning of the term. Under this execution the sheriff summoned R. Dudley Frayser, David Corrotti and the Union and Planters Banks to appear at the next term, the third Monday in May, and answer as garnishees. Before this, and during the January term, to-wit, on the 2d of May, the defendant Rocco appeared, prayed and obtained an appeal in error from the judgment on the pauper oath. Nevertheless, at the next term two of the garnishees, Frayser and Corrotti, appeared and answered, but upon motion the execution was quashed and they were discharged, and the plaintiff appealed.

The first question arising upon this appeal is, whether the levy of the execution by garnishments was discharged by the subsequent appeal in error of the defendant in the judgment. Ordinarily the question cannot arise, as no execution issues during the term, and an appeal in error cannot be granted after the term has been adjourned. It can only arise in

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cases where by special statute execution may issue before the time for appearing has expired.

It is argued that the appeal in error does not vacate, but only suspends the execution of the judgment below, and hence should not be held to displace or discharge any liens or rights acquired in the meantime. It is assumed to be analogous to a case where a writ of error and supersedeas issues after the levy of an execution, and it may be conceded that the analogy is complete. It may also be conceded that the service of the garnishment fixes a lien upon effects of the debtor or debt due to him from the garnishee equivalent in this respect to an actual levy upon personal property.

We do not find that the effect of a writ of error and supersedeas from this court as to the levy of an execution issued upon the judgment superseded, has been decided. It has been decided, however, that the issuance of an injunction discharges the lien of an execution levied upon personal property, and authorizes the officer to return the property to the debtor: *Overton v. Perkins*, M. & Yer., 373. And such also has been held to be the effect of a *certiorari* and *supersedeas* to bring up to the circuit court the judgment of a justice of the peace: *McCamy v. Lawson*, 3 Head, 256; *Littleton v. Yost*, 3 Lea, 267. This seems to us to be in principle identical with the question before us. The effect of the *supersedeas*, it is true, is simply to supersede and suspend further proceedings and not to reverse or undo what has been done, and so says Judge Caruthers in *McCamy v. Lawson*: "At

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first view it would seem that the effect of the *superseas* should only be to suspend the sale, but not to release the property; and as an original question we might be inclined to so hold, but we consider the contrary to be too well settled to be now disturbed by the courts." The rule is different as to a levy upon real estate: See above case and *Littleton v. Yost*, 3 Lea, 267.

The exception as to personal property is from necessity, for it would ruin both debtor and creditor if the sheriff is to hold personal goods to the termination of an injunction bill in chancery, or a writ of error and *supersedeas* in this court. No injury can result to the creditor where bond and security is given, but it does not alter the question that the process is obtained upon the pauper's oath, as held in *McCamy v. Lawson*.

In a case like the present another difficulty would occur. At the time the garnishment process was returned, the cause had been brought to this court by the appeal in error; it was therefore clear that the circuit court at that time had no jurisdiction to require the answer from the garnishees, and to render judgment against them if their answer should authorize a judgment. Any decree or judgment rendered in the inferior court after the cause is in the supreme court by writ of error and *supersedeas*, is without jurisdiction and void: *Claiborne v. Crockett*, Meigs, 607.

Hence no steps could have been taken. At most, the court could only supersede further proceedings. In the event the writ of error and *supersedeas* should

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be dismissed without final judgment in this court, the circuit court might proceed, but the process against the garnishees would probably in the meantime have been discontinued. Besides, the practice is to render final judgment and award execution from this court.

It seems to be established, however, by the authorities referred to, that a levy upon personal property would be discharged by writ of error and *supersedeas*, and the same rule must apply to a levy by garnishment; and the argument for the plaintiff bases the present case upon its analogy to a case of writ of error and *supersedeas*.

If this proposition be considered doubtful, the result in this case must be the same, as the answer of the garnishees does not admit any liability. The answer shows that one of the defendants has money in his hands, the proceeds of property assigned to him by the defendant Rocco for the benefit of all his creditors, the assignment being made and registered before complainant's judgment was rendered, but after the first day of the term of the court at which it was rendered, and therefore after the teste of the execution. The question involved was decided against the supposed lien of the execution in the case of *Berry v. Clements*, 9 Hum., 312. We are asked to overrule this case, but we think it was correctly decided; at all events, we are not prepared to overrule it.

The relation of the lien of an execution to its teste, so as to overreach intermediate transfers of personal chattels, is a pure fiction of law, that ought not to be indulged further than the courts are bound

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to go by the well-settled law. Such fictions should not be extended to work injustice. The case referred to is based on sound reasoning.

The judgment must, therefore, be affirmed.

Judge COOPER places his concurrence upon the latter ground.

E. G. MALONE v. N. M. DEAN.

CHANCERY JURISDICTION. Chancery court has no jurisdiction to enforce the vendor's equitable lien, where the amount of the demand is less than \$50.

FROM OBION.

Appeal from the Chancery Court at Troy. **JNO. SOMERS, Ch.**

S. M. HOWARD for complainant.

J. G. SMITH for defendant.

McFARLAND, J., delivered the opinion of the court.

This is a bill in the chancery court to enforce a vendor's lien upon a tract of land which had been sold and conveyed by deed. The bill exhibits the

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note with the credits endorsed, as the evidence of the balance claimed, from which it appears that the amount is less than \$50—in fact less than \$25. Upon motion of the defendant the chancellor dismissed the bill for want of jurisdiction, and the complainant has appealed.

It is first argued on behalf of the complainant, that in respect to the question of jurisdiction, the amount of the “demand” is to be governed by the amount of the note in the first instance, without regard to the credits. For this position the case of *Spurlock v. Foulks*, 1 Swan, 289, is relied upon; the authority, however, does not sustain the position assumed. The case holds that the amount of the debt or demand “sued for,” determines the jurisdiction, and not the amount found to be due on the hearing. Hence, if the complainant had sued for or demanded in his bill the whole amount of the note, or as much as \$50, and the credits reducing the balance below that sum had been introduced by the defense, the jurisdiction would not be defeated. But the complainant exhibits the note with the credits, expressly referring to the latter, and in terms only “sues for” or demands the balance, which from simple calculation appears to have been at the filing of the bill less than \$25. But it is insisted that as there is no other tribunal having jurisdiction to enforce the vendor’s lien, a court of chancery has jurisdiction in such cases without regard to the amount. The jurisdiction of the court is declared in the following sections of the Code: 4280. “They have exclusive original jurisdiction of all cases of an equitable nature, where the debt or

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demand exceeds fifty dollars, unless otherwise provided by this Code." 4281. "They have no jurisdiction of any debt or demand of less value than fifty dollars." 4282. "They have exclusive jurisdiction to aid a creditor, by judgment or decree, to subject the property of the defendant which cannot be reached by execution, to the satisfaction of the judgment or decree under the provisions of this Code."

This court held, in *Putnam v. Bently*, 8 Baxt., 84, that in cases falling under the latter section, the jurisdiction was not limited as to the amount. That is to say, where a creditor by *judgment* or *decree* is seeking to reach the property of the debtor which cannot be reached by execution. This conclusion was reached by a construction of the three sections together. The first two sections being held to have reference to cases of original jurisdiction, and the last section to cases of auxiliary jurisdiction, which is exclusively conferred upon the chancery court without the express limit embraced in the other sections. The present case does not fall within *Putnam v. Bently*, for the reason that complainant is not a creditor by *judgment* or *decree*, seeking to reach property of the defendant which cannot be reached by execution.

The question is, shall we make a still further exception to the positive provisions of sections 4280 and 4281, and hold that where there is no other remedy for the enforcement of the right, that the chancery court has the jurisdiction without regard to the amount? I am unable to see how this can be done, without utterly ignoring the positive language of the sections

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referred to. The argument is, that the limit does not apply to cases where there is no other remedy, or, in other words, to cases where the jurisdiction of the chancery court is exclusive; in other words, if the chancery court has exclusive jurisdiction to enforce the particular right, then there is no restriction as to the amount.

If this be true, then in what cases would the limit of \$50 apply, as the law stood when the statutes from which sections 4280 and 4281 were enacted? the former being from the act of 1835, ch. 20—the latter from the act of 1801, ch. 11.

If the limit did not apply in cases where there was no other remedy, or in other words, where the jurisdiction was exclusive, it would logically follow that it could not apply in cases where the jurisdiction was concurrent with some other court. But section 4280 declares that "They have *exclusive original* jurisdiction in all cases of an equitable nature where the debt or demand exceed fifty dollars, unless otherwise provided by this Code." So that the cases where the jurisdiction is limited to sums of fifty dollars and upwards, are by the very words of the statute, cases of *exclusive* jurisdiction. If it had been meant that there was no limit as to amount where there was no other remedy or where the jurisdiction was exclusive, why add "where the debt or demand exceeds fifty dollars." At the time these statutes were enacted, I take it that pretty much all the jurisdiction the chancery court had was *exclusive*. Cases of concurrent jurisdiction at that time were rare. But section 4281 is more emphatic,

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It declares that "They have no jurisdiction of *any debt or demand* of less value than fifty dollars." If we follow this plain and positive statute, we must hold that the chancery court has no jurisdiction of the *debt or demand*, and yet we are asked to hold that the court has jurisdiction to enforce the lien for the payment of the debt. But to repeat, if we hold that the limit as to amount does not apply to a case like this, to what cases does it apply?

In what character of cases will sections 4280 and 4281 be held to operate? Especially to what cases did these provisions apply when the statutes were enacted? The only answer consistent with the argument on the other side on the question, would be that the limit applies not to cases where there is no other remedy, but to cases where there is another remedy. But by the very terms of sec. 4280, it applies to cases of *exclusive original* jurisdiction in the chancery court. In fact it was a rule of almost general application, that the chancery court had no jurisdiction at all if there was an adequate remedy at law.

I am not prepared to concede the proposition upon which the whole argument for the jurisdiction rests, that is to say, that there is no other remedy to enforce the lien in a case like this. Why may not an attachment at law before a justice of the peace be sued out and prosecuted for the enforcement of the lien? Other liens upon real estate as well as personal property are enforced in this mode, as, for instance, mechanic's liens, and others of a similar character.

There is no express statutory authority for it in a

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case like this, but to say the least of it, there are less difficulties in the way of such jurisdiction than we are met with in the effort to maintain the jurisdiction in the chancery court.

But if we were even forced to admit that there is no other remedy for the enforcement of such a lien, it is no answer to the plain language of the statute. It would simply result that the law does not recognize or make provision for the enforcement of such liens where the amount is less than \$50. And in view of the expense attending proceedings in chancery, the denial of the remedy in that tribunal would be no great hardship. The creditor, of course, still has his remedy for the debt.

It is true it was held, in *The State v. Covington*, 4 Lea, 51, that justices of the peace have no jurisdiction to entertain proceedings in the nature of a bill in chancery for the enforcement of liens, and it was said that there is no necessity for such holding in order to meet the defect in chancery jurisdiction. "For," says Judge Cooper, "although by the Code, sec. 4281, chancery courts are declared to have 'no jurisdiction of any debt or demand of less value than fifty dollars,' yet this restriction only applies when the jurisdiction turns wholly upon the amount involved." "If," he adds, "the jurisdiction to grant the relief sought is exclusively conferred upon the chancery court, the limitation does not apply." But for this the construction given to sec. 4282, in *Putnam v. Bentley*, and another similar case, is referred to, which shows that nothing further was intended than the recognition of

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these cases. At all events, the point decided in *The State v. Covington*, was simply that a proceeding in the nature of a bill in chancery does not lie before a justice of the peace to enforce a lien.

The vendor's lien upon land has long been recognized as an appropriate head of chancery jurisdiction, and was so recognized at the time the statutes in question were enacted, and yet there is no exception made in favor of such cases as to the amount involved, and I presume no case can be found in our reports where a bill for the enforcement of such a lien has been sustained, where the amount involved is less than fifty dollars.

If the jurisdiction is maintained in a case like this, I should be at a loss to know in what cases of chancery jurisdiction, as it existed at the passage of the acts of 1801 and 1835, the limit of \$50 would apply.

I am of opinion that the decree of the chancellor dismissing the bill for want of jurisdiction, should be affirmed, and the court concurring, it is so ordered.

Affirmed with costs.

Bowden v. Higgs.

B. D. BOWDEN *et al.* v. J. A. J. HIGGS.

EXECUTOR. *Attorney's fee if will is not established.* If a person named as executor in a will offers it for probate and it is sustained in the county court, but upon appeal to the circuit court it is not established, he will be allowed reasonable attorney's fee out of the estate, if the proceedings were in good faith and upon reasonable grounds.

FROM HENRY.

Appeal in error from the Circuit Court of Henry county. C. ADEN, J.

J. N. THOMASON for Bowden.

J. M. CLARK for Higgs.

DEADERICK, C. J., delivered the opinion of the court.

This case is before this court upon the following agreed state of facts: A paper purporting to be the last will and testament of John Hartsfield, deceased, was produced before the county court of Henry county, for probate, by defendant Higgs, who was nominated therein as one of its executors. The plaintiffs, Bowden *et al.*, who are heirs at law of said Hartsfield, appeared and resisted its probate. Said paper was admitted to probate as the will of Hartsfield by the county court, and Higgs was qualified as executor

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thereof. But letters testamentary were not issued to him, the said Bowden and others appealing from the order of the county court to the circuit court. There the issue made up as to the validity of the will was tried, and verdict and judgment were against the will, and the facts were certified to the county court. Higgs employed counsel to aid in establishing the will in the circuit court, and in his settlement in the county court was allowed \$300 for counsel fees paid, which credit, on appeal to the circuit court, was again allowed, and the said Bowden and others appealed to this court.

The question is thus presented, whether one named as executor in a paper purporting to be a will of a deceased person, who propounds such paper for probate before the county court, and which paper is admitted to probate by said county court and the propounder qualified as executor may, at the expense of the estate, employ counsel to establish the will, although upon the trial of the issue of *devisavit vel non* said issue is found against the will.

Section 2173 of the Code provides that where the validity of a will is contested, the fact is to be certified by the county court to the circuit court, and the original will shall be sent up, and the contestant shall enter into bond with security, "payable to the executor mentioned in the will," conditioned for the faithful prosecution of the suit, or payment of costs. This section seems to place the "executor mentioned in the will," in the attitude of a plaintiff in the circuit court, charged with the duty of maintaining the

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validity of the will, while the contestants are defendants denying its validity.

The next section, 2174, requires the adult legatees or devisees, who have notice of the contest, to give bond with surety to prosecute the suit—if they claim under the will. This last named section, however, does not repeal the preceding one, as there may be and are many cases in which all the legatees and devisees are minors, who are not required to give bond, or to prosecute the suit.

The “executor named in the will,” being placed by the statute in the attitude of plaintiff upon the issue made up for trial, and charged with the duty of carrying out the supposed will of the deceased, ought not to be held personally liable for counsel fees in the event of the failure to establish the will. .

It is to ascertain the fact whether the paper is the will, that the statute directs an issue shall be made, and charges the “executor” named in the will, with the duty of maintaining the affirmative of the proposition. The judgment of the county court was in favor of the will.

It has been said by this court that the executor is the proper party to represent those who are interested in the provisions of the will: 11 Hum., 486–7. And it has also been held, in a case in which the will was established, that it is the duty of the executor named, to propound the will for probate, and to take all proper steps, and incur necessary expenses to sustain the will: 1 Cold., 472. The court adds, how this would be if the will was not established, we need

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not say, as this case does not call for an opinion on that point.

But it seems to us, if it was the duty of the executor to propound the will and to sustain it in the courts by incurring expense to sustain it, these were obligations resting upon him, independently of the result of the contest. He might not know when he offered the will for probate, that it would be contested. When the issue was made up and certified to the circuit court, he could not tell what the verdict and judgment would be until it was rendered. Yet this court has said it was his duty to fee counsel and litigate the question, and to seek to establish the will. And the statute, by placing him in the attitude of a plaintiff affirming the validity of the will before the court, virtually imposes upon him the duty of doing all that is proper and necessary to establish the will. And all these duties are to be performed before the issue is determined, or the result of the litigation can be known. Under such circumstances an executor, having no pecuniary interest in the result, should not be subjected to pecuniary loss.

It may be said he need not incur the liability—he might renounce. So he might; but if all the legatees and devisees were minors, another executor would perhaps be necessary, before the contest could proceed.

It is said that the judgment being against the validity of the will, to require the estate to pay the expenses incurred by the executor named, for counsel fees, would subject the contestants to the payment of

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their adversary's fees. This is true to some extent, and is a plausible reason against the allowance of such fees out of the estate. But the executor named in the will, although the jury find against its validity, is regarded by our statute and decisions as the representative of the estate, in the contest inaugurated, to ascertain whether the estate is to be distributed according to the will, or according to our statutes in cases of intestancy. And where proceedings are instituted and conducted in good faith, and upon reasonable grounds, to establish a will, we think the expenses incident thereto should be borne by the estate, rather than by an executor named in the will, who has no pecuniary interest in the result of the contest.

The judgment will be affirmed.

Judges COOPER and MCFARLAND dissent.

Harber v. Frazier.

J. C. BARBEE, Adm'r, etc. v. JOSEPH P. FRAZIER.

PLEADINGS AND PRACTICE. *Administrator. Suit in forma pauperis.* An administrator who is sole beneficiary in a recovery of a suit which he might maintain in his own name, cannot maintain such action as an administrator in *forma pauperis*.

FROM WEAKLEY.

Appeal in error from the Circuit Court of Weakley county. C. ADEN, J.

B. B. EDWARDS and C. M. EWING for Barbee.

M. D. CARDWELL, H. H. BARR and W. E. BOWDEN for Frazier.

DEADERICK, C. J., delivered the opinion of the court.

This is an action brought by plaintiff, J. C. Barbee, as administrator of his son, Eugene Barbee, by original attachment, for the killing of said Eugene by defendant.

The suit is brought without any bond for costs and damages, but plaintiff made oath that he was unable to bear the expenses of the suit, and that intestate left no property, etc. Upon motion, the court discharged the attachment and dismissed the suit, and plaintiff has appealed under the pauper's oath.

Haliday Bros. v. Croom.

The question presented by the record is: Can this suit be maintained by the administrator without bond? The plaintiff is the father and sole beneficiary in the suit, and might, under our statutes, have brought the suit in his own name, and for his own benefit.

Without, therefore, discussing or determining the question whether an administrator may, in ordinary cases, prosecute a suit in *forma pauperis*, we hold that in a case like this, where the administrator is personally the sole beneficiary of any recovery that may be had where he may in his individual character maintain the suit, he cannot, in the character of administrator, prosecute such action in *forma pauperis*.

The judgment of the circuit court will be affirmed.

HALIDAY BROS. *et al.* v. CROOM, GARDNER *et al.*

CHANCERY PLEADINGS AND PRACTICE. *Trust deed. Beneficiaries.* A beneficiary under a trust deed may attack a claim, secured therein, as fraudulent, and yet be allowed to claim under the trust.

FROM MADISON.

Appeal from the Chancery Court at Jackson. H.
W. McCORRY, Ch.

Haliday Bros. v. Croom.

A. W. CAMPBELL, MCCORRY & BOND, BULLOCK & HOYS and J. L. H. TOMLIN for complainants.

MUSE & BUFORD for defendants.

TURNER, J., delivered the opinion of the court.

Croom being largely indebted, made to Marshall, as trustee, a deed in trust to secure all his creditors, giving preference to Hayns & Bro. and to Gardner. After the payment of the two preferred claims, the remainder of the debts were to be paid *pro rata*.

Complainants file this bill, charging the debt secured to Gardner to be fraudulent, and sustained the charge by proof.

There was a demurrer, upon the ground that the complainants, being beneficiaries under the deed, could not attack it in part as fraudulent, but are compelled to accept or reject the deed as an entirety. The demurrer was overruled, properly as we think. The general rule relied on is applicable only in cases where the entire deed is impeached. In such case, the attacking party must stand by his election, and if he fail, can take nothing under the deed.

To apply the rule to a case like the present, would be to give to a fraudulent debtor the power to reserve in the name of a friend a benefit to himself out of property or funds that should in equity and good conscience go to his creditors. The deed may be treated as several made for the benefit of each creditor. If, instead of one deed, the debtor had made one for each creditor, giving such preference as he

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desired, and subjecting each subsequent conveyance to the liens of those preceding it, it will be hardly contended that a beneficiary under a subsequent deed is estopped to deny the *bona fides* of each or all or any of the deeds preceding the one under which he claims. Each deed would give to those claiming under it, adverse interests to those claiming under the others. So here each creditor secured or provided for, has interests adverse to those provided for in the same deed, and each debt must stand upon its own merits, and cannot stand simply because included in a catalogue with honest ones. If, then, a beneficiary in one deed may attack the integrity of the claim of one under another and different deed, there can be no good reason why the same attack may not be made when all claim under the same deed in different rights.

The one deed is made for convenience and economy merely, but is in law as many deeds as there are beneficiaries, and must be so treated in this suit.

Affirmed.

Stewart v. Taylor.

S. A. STEWART v. J. A. TAYLOR, Adm'r.

ADMINISTRATION. *Clerk's fees. Exemption.* The uncollected fees of a deceased clerk go to the administrator, to be by him administered, and not to his widow.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

T. B. EDGINGTON for complainant.

TAYLOR & CARROLL and MALONE & WATSON for
defendant.

FREEMAN, J., delivered the opinion of the court.

This is an agreed case presenting the following
state of facts:

Stewart had been clerk and master of the Second Chancery Court of Memphis, before said court was abolished in 1875. As such clerk and master, he had certain fees due him, and which have been, or are in process of collection, by the clerk and master of the Chancery Court of Shelby county. Stewart died, and Taylor is his administrator.

The question presented, whether the widow is entitled to all sums due her late husband, as exempted property, and the administrator excluded from their receipt as assets of the estate.

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While it has been held, on grounds of public policy, as well as for other reasons, that the salary of an officer, as well as fees accruing to an officer, were not subject to attachment, or process of garnishment, at the hands of his creditors, and the rule uniformly adhered to since the case of *Bank of Tennessee v. Dibrell*, 3 Sneed, 377, it has never been held that these fees or a salary came within the language or spirit of our law exempting certain specific articles from execution. These articles so exempted are deemed necessities for support and maintenance of the family of the citizen, and are exempted in view of a sound public policy. The articles so exempted are specifically enumerated in section of the Code 2107 *a*, and subsequent sections, but no exemption of fees of office is found in their provisions. In fact, no such exemption in the nature of the thing, would likely be found in such statutes, as they are not property, or liable as such to execution or attachment.

The property exempt from execution by sec. 2288, is exempt in the hands of the widow, but the property meant is that specified in the exemption provisions of the Code, and has no relation whatever to such monies as may be due the intestate, whether as fees or salary of office, as are in contest here.

These monies go to the administrator as other assets to be by him administered, and stand as other monies or debts due the deceased, with no exemption from administration or liability to appropriation for debts due any more than other debts due the intestate.

The court below so held, and we affirm the judgment.

Hutson v. Hutson.

JONATHAN HUTSON *et al* v. A. J. HUTSON, Ex'r.

PLEADINGS AND PRACTICE AT LAW. *Depositions. Exceptions.* A deposition taken by a justice of the peace, and by him handed to the clerk of the court in which the suit is pending, is not subject to exception because he did not envelope and seal it and endorse upon the seal his name and the style of the cause.

FROM HENRY.

Appeal in error from the Circuit Court of Henry county. C. ADEN, J.

J. N. THOMASON and S. J. TAYLOR for J. Hutson.

W. M. JANES and T. C. FRYER for A. J. Hutson.

McFARLAND, J., delivered the opinion of the court.

This issue made up to try the validity of the will of William Hutson, deceased, was tried by the circuit court without a jury, and found in favor of the will. The contestants have appealed in error.

The only error of law assigned is the action of the court in sustaining exceptions to certain depositions taken on behalf of the contestants. The exceptions were, that the justice taking the depositions, "did not envelope and seal them, and endorse on the seal the name of the commissioner and the style of the cause."

The justice probably omitted to observe this direction of the statute, because he in person delivered the deposition to the clerk of the circuit court where the

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cause was pending, his certificate showing that they had not been out of his possession or altered, until so delivered to the clerk.

Section 3860 of the Code provides, that "the deposition, when complete, shall be enveloped together with the commission, if any, and all documents which may have been deposed to, sealed with the commissioner's name written across the seal, and directed to the clerk of the court where the cause is pending, with the title of the cause endorsed thereon, and may be sent by mail or private conveyance."

If sent by private conveyance, the person delivering it shall make affidavit before the clerk that he received the deposition from the commissioner, that it has not been out of his possession or opened by him while in his possession: Sec. 3861.

The clerk is to endorse upon it the day it is filed, and may open it at any time: Secs. 3867, 3870.

We are of opinion that the above requirement of section 3860, should not be held to apply to cases where the depositions were taken by the clerk himself, or when they are delivered to the clerk in person by the justice or commissioner taking them without their having been out of his possession. There can be no reason in such a requirement in such cases.

We are of opinion, therefore, that the court below erred in sustaining the exceptions and excluding the depositions, as these depositions contain material testimony which the appellants have the right to have considered in the trial of the issue. The judgment must be reversed, and the cause remanded for a new trial. Reversed.

Brady & Co. v. Isler.

H. BRADY & CO. v. H. B. & R. M. ISLER.

PLEADINGS AND PRACTICE. *Suit prematurely brought.* Upon contract for sale of goods to be paid for in thirty days, if the vendee abandons the possession of the goods and vendor re-possesses them, he cannot sue for the purchase money before the expiration of the time of payment. He can only recover upon the contract, and suit to enforce collection before the money was due by the contract, cannot be maintained.

FROM LAKE.

Appeal in error from the Circuit Court of Lake county. C. ADEN, J.

J. G. SMITH for Brady & Co.

L. DONALSON, COCHRANE & ENLOE and W. H. SWIGGART, for Isler.

DEADERICK, C. J., delivered the opinion of the court.

This is an appeal by the plaintiffs from a judgment of the circuit court of Lake county.

Plaintiffs sold defendants a stock of goods for about \$7,000, and they were to pay \$2,000 in 30 days, and the balance in two installments, due respectively in 120 days, and 10 months.

The contract, or a memorandum thereof, was reduced to writing, bearing date 24th of January, 1874, and stipulates that the goods are to be the property of Brady & Co., until the first payment is made.

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Defendants were examined as witnesses on the trial and testified that at the time of the execution of the contract, it was agreed that it was not to be operative unless R. M. Isler's mother would consent to his entering into the arrangement and would become his surety for his part of the purchase money. Said R. M. being a minor. Said H. B. required that he should be thus indemnified. This testimony was objected to on the ground that it varied the terms of the written contract. It was admitted, however, by the court. It is well settled that proof by parol cannot be heard at law, to vary, enlarge or diminish the stipulations of a written contract, yet it may be heard to show whether such contract was in fact made, or whether only upon certain contingencies, it was to take effect.

Plaintiff Adams denies the fact that any such facts were stated, or conditions agreed to.

It appears from R. M. Isler's evidence, that his mother refused to accede to the terms stated—notwithstanding, this was known, the parties, except R. M., who had gone to Kentucky, to see his mother, proceeded to take an invoice of the goods, and when this was finished, the store was open for part of a day, and some \$15 of goods were sold. The vendors having in the store their own clerk to receive proceeds of sale of goods and apply to first payment due.

On return of R. M., and report of his mother's refusal to be bound for him, defendants refused to take the goods and surrendered the key of the store and goods therein to plaintiff.

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Before the expiration of thirty days from date of contract, plaintiff sold the goods for less than half the amount of the invoice costs, having notified H. B. Isler of their purpose to do so.

They now bring this suit to recover the difference between the price received upon a resale and the amount agreed to be paid by the contract.

It will be observed that no part of the purchase money was due at the time of the resale of the goods. And in such case the vendee has not been guilty of any breach of the contract as to payment, although he may be in default in respect to his refusal to receive the goods—or rather in the abandonment of their possession.

His Honor charged the jury that if defendants abandoned the possession, of the goods and the plaintiffs repossessed them, and sold them before the expiration of thirty days, they could not recover in this action. By this proceeding the original contract was not rescinded, and the vendor must recover upon that contract, and it is that on which this suit is brought, and no part of the purchase money being due at the time the suit was brought, it must fail, so that in the aspect of the case contended for by plaintiffs, that the contract is valid and subsisting, the money was not due upon it when suit was brought. And we think it is essential that it should be due, before suit is brought to enforce its collection: *Benj. on Sales*, 789, 794; 1 *Parson C.*, 537.

There was no error in the charge in this particular. The charge apparently may trench upon the pre-

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rogatives of the jury, in assuming that R. M. Isler was a minor. There was no contest over this question, but the charge was technically erroneous, but we can see it did not prejudice plaintiffs. No such defense was made for H. B. Isler, and both defendants are by the verdict exonerated from liability, and manifestly, upon one or both of the grounds already discussed.

Upon these issues the verdict is sufficiently sustained by the evidence, and the judgment will be affirmed.

C. SWEENEY v. J. N. THOMASON.

CONTRACT. *Parol proof.* In a suit upon contract "to pay eight dollars per thousand for brick in the wall," proof of the usage or custom that the number of brick in the wall was to be ascertained by measurement and not by actual count, is incompetent. The terms of the contract are not ambiguous. The words and terms of the contract are not terms of art having any special signification or meaning different from their ordinary or popular meaning. The number of brick should be counted, but if not practical to ascertain the number by actual count, there can be no objection to adopting estimates based upon measurement, as the best means of approximating the number.

FROM HENRY.

Appeal from the Chancery Court at Paris. JOHN SOMERS, Ch.

Sweeney v. Thomason.

COLE & SWEENEY for complainant.

F. WILLIAMS for defendant.

McFARLAND, J., delivered the opinion of the court.

This bill was brought to recover the amount due the complainant for the brick work in building a brick house for the defendant, under a written contract. The contract stipulates that the complainant is to furnish the material and build the house, "for which," in the language of the contract, "said Thomason is to pay him eight dollars per thousand for brick in the wall," * * * * * "said work is to be as though solid for all openings for doors and windows except the hall, and not that, if to be faced, or partly so, with brick." The house was built and a controversy arose as to the number of "brick in the wall," in the meaning of the above contract.

The complainant insisted that by the custom of brick masons, the number was to be ascertained by measurement, and the application of certain rules, as follows: Counting twenty-one bricks for every lineal foot of a thirteen inch wall, and fourteen bricks for every lineal foot in a nine inch wall. The walls of the house in controversy were, by the contract, in some parts, nine inch walls, and in other thirteen inch walls. It was insisted that by the same usage, a "nine inch wall" means the width of two bricks "side by side," and a "thirteen inch wall" means three bricks "side by side," without regard to the actual thickness of the wall.

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The complainant contended that these rules should be followed without regard to the actual number of "bricks in the wall." In his testimony he also asserts that the rule in ascertaining the number of feet is to measure all outside walls "outside to inside," and inside walls as if they passed entirely through the outside walls, so as to count part of the wall twice, but in his deposition he does not insist upon adhering to this rule. The bill charges that by the rules of measurement the building contains 124,540 bricks. The complainant's deposition fixes the number at 106,598.

The defendant insisted upon an actual count and an estimate of the openings upon the same basis, which, according to his proof, shows the number of bricks to be, at most, 78,810. He, however, proposed, by way of compromise, to pay for 90,000 bricks, or he proposed to go with complainant or any one he might select, and make the count, and pay complainant for 8,000 more than the count. These propositions were rejected. Defendant had paid \$632.11.

The chancellor's decree was in favor of the complainant, and the defendant appealed.

The only proof in regard to the usage or custom alleged, is the testimony of the complainant and one other brick-mason. Complainant, after giving the rule he had adopted, was asked by his counsel to state "what other method of determining the number of bricks in the wall is used by contractors of brick work. His answer is: "I don't know that I can state any other. I don't use any other." The other witness says he knows of no other rule of counting,

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that he never worked on a house where it was counted differently. The defendant testifies that he knew of no such usage or custom when he made the contract; he says he dictated the term "brick in the wall" in the contract, to avoid being charged with the count at the kiln. The question is, whether the proof is admissible for the purpose for which it was introduced, and if so, is it sufficient to establish the meaning given by the chancellor to the terms used in the written contract.

The words and terms used in the contract *prima facie*, at least, are not terms of art having any special signification or meaning, different from their ordinary or popular meaning. The words "per thousand brick in the wall" will be readily understood to mean literally what the words imply. There is no ambiguity or uncertainty in the meaning, nor is there any word used not readily understood without interpretation by experts.

It would hardly be admissible to prove that by custom or usage of brick-masons "1,000" bricks means "500," or any number less than "1,000." Where it is not practical to ascertain the number by actual count, there can be no objection to adopting as the best means of approximating the number, estimates based upon measurement. But such estimates ought ordinarily to be based upon some rule calculated to ascertain the actual number. That is to say, if by actual count a lineal foot of a wall be found to contain a given number of bricks, this rule may be adopted as to the remainder of the wall. But why arbitrarily assume that a lineal foot of the wall con-

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tains a number of bricks that it is conceded it does not contain? Clearly this cannot be done unless as contended in behalf of the complainants: The words "per thousand brick in the wall" means not actually "per thousand," but "per thousand" as ascertained by the rule of brick-masons above referred to.

Conceding for the argument, that such a rule or usage might be established, and the meaning of a written contract, otherwise plain and unambiguous, made to conform thereto—a concession only made for the argument. Still we think the proof in this case is insufficient for the purpose. Courts must construe written contracts according to the intention of the parties to be gathered from the language, and interpreted in the light of the accompanying circumstances. If at the time and place the contract was made, the usage and custom in question had become so general and well established as to afford a presumption that it was known to the defendant, and the contract entered into in reference thereto, then it might be sufficient. But the proof of the complainant only is that he has always adopted the rule, and he cannot say that there is any other, or that he knows of no other, and the proof of the other witness is substantially to the same effect. We see no reason why contracts shall not be made to express what is really intended. If the complainant meant to stipulate that 1,000 bricks should mean anything less than 1,000, it would have been easy to so express it upon the face of the contract, and then no one would be deceived or mislead.

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We see no sufficient reason for holding that this defendant has agreed to pay anything more than is expressed in plain language in his contract, or that he understood it to mean anything different from the plain and natural import of the language: See *Bedford v. McCall*, 11 Hum., 247. The contract being to pay eight dollars per thousand for brick in the wall, the question of fact was the ascertainment of the number, either by actual count if practical, or by some mode of measurement calculated to ascertain the number. The complainant, however, is not willing to accept payment for the actual number of bricks, but insists upon being paid upon a wholly different basis. The only proof going to show the correct number of bricks according to the contract, is the testimony of the defendant, and according to this, the complainant has been fully paid.

The decree will be reversed with costs.

Hearn v. Roberts.

S. C. HEARN, Adm'r. v. ROBERTS *et al.*

ADMINISTRATION. *Insolvent estate. Statute of limitation.* The suggestion of the insolvency of an estate does not change the period of limitation for suing on claims not due at the time of the qualification of the personal representative, but the claimant may, under the Code, Secs. 2330, 2377, be barred from becoming a party to an insolvent suit, or participating in the division of assets, unless he file his claim in said suit before an appropriation of the funds of the estate.

FROM HENRY.

Appeal from the Chancery Court at Paris. JNO. SOMERS, Ch.

T. C. FRYER and J. M. CLARK for complainant.

J. M. Thomason for defendants.

COOPER, J., delivered the opinion of the court.

Administration on the estate of S. C. Love was granted at the September term, 1874, of the county court. The suggestion of the insolvency of the estate was made to that court at the February term, 1875. This bill was filed in the chancery court on the — day of —, 1879, to transfer the settlement of the estate, as an insolvent estate, to the chancery court. On August 20, 1880, McKissick & Turley made themselves parties defendant to this suit, claiming to be creditors of the intestate on demands which became due in April, 1879. The funds of the estate had not

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then been appropriated. The chancellor disallowed these claims upon the ground that they were barred by the statute of limitations of two years, and the claimants appealed.

Ordinarily the bar of the statute of two years only begins to run, on claims not due at the time of the qualification of the personal representative, from the time the claims fall due: *Trott v. West*, 9 Yer., 433. And the laws regulating the administration of insolvent estates will not affect the operation of the statute: *Marley v. Cummings*, 5 Sneed, 479. If the suit be not brought on the claim, or the claim filed within two years from its maturity, it will be barred, notwithstanding the commencement and pending of an insolvent suit. Will it be barred by the institution and pendency of such suit, when it does not fall due until after the suggestion of insolvency, and is filed before the funds of the estate are appropriated, and within two years after it does fall due? That is the question presented by the record.

The Code contains special provisions touching the administration of insolvent estates in the county court, and other provisions regulating the administration of such estates in the chancery court. In such cases, there is substantially the same provisions for claims not due, namely, that the creditor may file his claim for adjudication, and come in for a ratable distribution. If the debt be paid before due, a discount shall be made therefrom at the rate of six per cent per annum until the debt falls due; and if the debt cannot be paid until due, the court may direct a por-

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tion of the property to be sold on long time to meet it, or have the money loaned out until the debt falls due. The sections of the Code regulating the administration of insolvent estates in the county court contains no provision in relation to claims not due which would change the time when the statute of limitations would begin to run on such claims, or otherwise affect the legal rights of the holders of such claims, except the last clause of section 2330, which is: "And any claim not filed on or before the day fixed (by notice), or before an appropriation of the funds of the estate is made, shall be forever barred both in law and equity." It is clear, therefore, that in the administration of an estate in the county court upon a suggestion of insolvency, a creditor whose claim is not due will not be barred of his action within the time of the statute after its maturity, if he file the claim at any time before an appropriation of the funds of the estate.

Among the provisions of the Code for the administration of insolvent estates in the chancery court, and immediately following the section, common to the administration of such estates both in the county and chancery courts, allowing claims not due to be filed, are these:

"2376. All creditors who shall fail to bring suit for their demands, or to come in under these proceedings and present their claims within the time prescribed by law, shall be forever barred and prohibited from becoming parties to such proceedings."

"2377. Creditors whose debts are not due shall be

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under the same obligation to present their claims as those whose debts are due, and upon failure to do so shall be barred in like manner; but a creditor shall not be bound to present his claim before due, except where the estate is represented to be insolvent as herein provided."

The "time prescribed by law" in the first of these sections means the time of the statute of limitations. And, therefore, if the creditor bring his suit, or file his claim within the time of the statute, it is sufficient. Consequently, if he bring his suit within the time, he may file his claim at any time thereafter before the funds are appropriated: *Latta v. Sumerow*, 4 Lea, 486; *Hurley v. Paul*, 2 Tenn. Ch., 620, affirmed by this court. If the claim is not barred by the statute of limitations, either because it has been separately sued upon, or because it has not been due for the two years, it may be properly presented at any time "before an appropriation of the funds is made." The language of section 2377, that "creditors whose debts are not due shall be under the same obligation to present their claims as those whose debts are due," does not mean that they shall sue within two years from the grant of letters, but, in the words of section 2376, that they shall bring suit or present their claims in the insolvent case "within the time prescribed by law;" that is, within the time allowed by law for suing upon such claims "before an appropriation of the funds of the estate." The time within which to sue is not changed, but if the funds have been appropriated before suit brought by presenting the

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claim, the creditor, again using the words of section 2376, "shall be forever barred and prohibited from becoming parties to such proceedings." The creditor is barred from becoming a party to the suit, and the claim be prevented from receiving its *pro rata* of the estate. Any other construction of these provisions would lead to the *reductio ad absurdum*, that if the insolvency of the estate is not suggested for more than two years and six months after the grant of letters of administration, claims not due would be barred although they could not possibly have been sued on before.

The chancellor's decree must be reversed, and the cause remanded for further proceedings.

FREEMAN, J., delivered the following dissenting opinion:

The answer to the opinion of the majority of the court is, that while it is ingenious and plausible, it is not what the statute means, in my opinion, we have but to put the three sections together, to see this.

2375 provides that: "Even a creditor whose debt is not due may become a party to the proceeding, and come in for his ratable distribution; and then adds provision for discount in case of payment before due.

2376 is, that all creditors who shall fail to bring suit, or come in under these proceedings and present their claims within the time prescribed by law, shall be forever barred and prohibited from becoming parties

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to such proceedings. That this means within the period fixed by the statute of 1789—two years and six months, and three years is conceded, and has never been questioned.

It might well have been held that the creditor, whose debt was not due, was barred under this section alone, as it provides both for suit and coming in under these proceedings, the former clause might well apply to claims due, and which might have been sued on, and the latter to those not due, but which the previous section had provided might be brought in and filed for settlement.

But to make it beyond question what is meant, section 3377 is added, that “creditors, whose debts are not due, shall be under the same obligations to present their claims as those whose debts are due, and upon failure to do so, shall be barred in like manner, but a creditor shall not be bound to present his claim before due, except where the estate is represented to be insolvent as herein provided.”

If this does not put the creditor where debt is not due, precisely on the same footing as one whose debt is due, the language simply does not mean what it says. The same obligation is imposed to present their claims, and the rule as to one is the rule as to the other. The rule as to the due debt is prescribed by the section before, and is the one fixed by statute of limitations of two years and six months—and then it is provided, that on failure to present, “they shall be barred in like manner.” This can only mean in the same time, as there is no form or manner of barring

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a claim, save simply by lapse of time. It is added such creditor is not bound to present his claim before due, except when the estate is represented to be insolvent as herein provided, that is, after suggestion in county court, been filed, and publication or service as provided for. When this is done he must come in, or be barred, or "prohibited from becoming party to such proceeding—to use the language of the statute.

I am unable to see on what principle we can hold that the section 2376 can be held to refer to a section in the other chapter providing for administration of insolvent estates in county court, and "within the time prescribed by law," to mean within the time prescribed by law for suing upon such claims "before an appropriation of the fund. This meaning is purely arbitrary. Each chapter is a complete system of itself—and each step in the proceeding, specifically regulated in it.

The time allowed by law for suing on claims is two years and six months—if within the State. This has been held to apply in ordinary cases to that length of time after the debt becomes due, but the statutes cited add that claims not due shall be presented, and if not, then they shall be barred in like manner—as if due—when the estate is being administered in the chancery court. While it might gratify our sense of right, to have proper claims allowed and filed, it cannot be a sufficient ground on which to give a construction to the statute which—its language does not impart—as to the suggestion, that the creditor, not the claim, is barred from becoming a party. We need

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only say, it would be difficult to conceive how a claim could become a party to a suit at all—and if the creditor got in without a claim, he would not be very successful, and a claim without a creditor, would probably share the same fate.

As to the difficulty, that if the insolvency of the estate is suggested more than two years and six months after grant of administration, claims not due would be barred, although they could not be sued on, we only say, that we are not called on to remove apparent difficulties, but to ascertain the meaning of the language of the Legislature. If suits grow out of it, or hardships, it is for the Legislature, and not this court, to apply the remedy.

But the fact is, the Legislature did not contemplate or provide for any such case ever occurring. It was intended, and is so provided, as the first section of the act for administration of insolvent estates in the county court, that the administrator should ascertain the solvency or insolvency of the estate within six months after grant of letters of administration, and for this purpose it is forbidden that he shall be sued, etc. If this law and its purpose had been adhered to in practice, the insolvency would always be suggested in six months, and then the creditor, whose claim was not due, would be in precise the same condition as the one whose debt was due, and have the same time in which to present his claim. Such was the system, in fact, enacted by the Legislature.

This being the purpose, the whole system is harmonious. The fact that the provisions we have cited

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were enacted in view of the six months being allowed for suggestion of insolvency, shows however, conclusively, that the construction we have given is the correct one, and the only one intended by the Legislature.

For these and other reason that might be given, I am compelled to dissent from the opinion of my brethren, and hold the chancellor's decree correct, and ought to be affirmed.

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C. B. MURPHY v. THE STATE.

1. CRIMINAL LAW. *Juror's challenge.* A person is incompetent to sit as a juror in a criminal case, and may be challenged for cause by the State, who has been tried and acquitted of a criminal charge at the term at which he is presented as a juror.
2. SAME. *Same.* A juror, already selected and sworn in a criminal case, who announces that he had a suit in court, may be challenged by the State for cause and set aside by the court, although the clerk may, while the point is being brought by the court to the attention of counsel, proceed to swear the entire jury, all parties understanding the juror to mean that he had a suit pending at that term.
3. SAME. *Proof of separate offenses.* *Attorney-General should elect.* Under a general presentment for selling an intoxicating beverage within four miles of an incorporated institution of learning, the State introduced three witnesses, each of whom proved a sale to him by the defendant about the same time of cider by the drink, to which was added, at the option of the purchaser, spirituous liquor. *Held*, the evidence of separate offenses was admissible to show the intent of the defendant, but that the attorney-general should have been required to elect on which offense he would try the defendant.

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4. CONSTITUTIONAL LAW. *Municipal corporations.* The act of 1881, ch. 122, entitled "an act prescribing a mode by which municipal corporations may surrender or abolish their charters," is unconstitutional, because in violation of the Constitution, art. 2, sec. 17, it contains provisions for amending the charters of municipal corporations, in addition to those for abolishing the charters of such corporations.

FROM DECATUR.

Appeal in error from the Circuit Court of Decatur county. T. P. BATEMAN, J.

L. S. WOODS, J. M. TAYLOR and S. W. HAWKINS
for Murphy.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

The plaintiff in error having been convicted of selling an intoxicating beverage within four miles of an incorporated institution of learning, appealed in error.

After the State had exhausted its peremptory challenges, the attorney-general asked a person tendered as a juror if he did not have a suit pending in the court, and he replied that he had, on a previous day of the term, been tried and acquitted. The trial judge, over the objection of the defendant, held the person incompetent to serve as a juror, and he was set aside for this cause. A jury having been selected, the clerk, under the direction of the court, proceeded to swear, and had sworn eight of them, when one of the number informed the clerk that he had a suit in court, and the clerk stated to the judge what the juror said.

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The judge then announced to the attorney-general and the counsel of the defendant that one of the jurors had a suit in court. The clerk proceeded to the swearing of the other four jurors. The attorney-general then asked what the court said, and the judge repeated that one of the jurors had a suit in court. The attorney-general at once objected to the juror, and the judge told the clerk to hold on. Immediately after this was said, the last juror had kissed the book, and was handing it back to the clerk. At the instance of the attorney-general, and over the objection of the defendant, the court held the juror incompetent, and set him aside. Error is assigned on these rulings.

The Code, sec. 3988, forbids the appointment of any person to serve as a juror "who has an action pending in the court at the term to which he is nominated." By section 4010 either party is permitted to challenge for cause "any person who has a suit then pending for trial at the same term of the court." It is very obvious that the first person presented above as a juror should not have been appointed because he did have an action pending in the court at that term, although it may have been tried before he was presented as a juror. The incompetence is not made to depend upon the order of time in which a case may be heard at the term, but on the fact of having a suit pending at that term. In the matter of the other juror, it is obvious that the act of the clerk in proceeding to swear the entire jury, without the direction of the court, before the attorney-general had caught the fact announced and

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taken action, cannot be allowed to affect the question presented. That question is whether a juror, whose incompetency is disclosed before the jury is sworn, may be set aside for cause. To that question there can only be one answer. It is said, however, that the fact only appeared that he had a suit in court, and *non constat* that it was pending at the term. But it is obvious that the juror, the court and the attorney-general proceeded upon this assumption, which the language, although susceptible of a different sense, might well imply, and the objection was not made which is now relied on. It is unnecessary to determine whether, even if the fact were as now suggested that the suit was not pending for trial at that term, the case would not fall within the ruling in *Riley v. Bussel*, 1 Heis., 294.

The State introduced three witnesses, each of whom testified to a sale to him by the defendant, on the 8th or 9th of November, 1881, of one or more drinks of cider "spiked" with an intoxicating beverage. That is, the sale and purchase were of cider by the drink, the purchaser being allowed to add to it spirituous liquor according to his taste. The jury, on a proper charge, would of course be warranted in finding the defendant guilty of selling an intoxicating beverage, especially as one of the witnesses admitted the repetition of his potations of the "spiked" cider until he was actually intoxicated. The defendant objected to the introduction of testimony of more than one offense, and, on the objection being overruled, moved the court to require the attorney-general to elect on which one

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of the three offenses he would try the defendant. The court refused the motion, but in his charge to the jury said: "If he (the defendant) is found to have made more sales than one before the finding of the presentment, the verdict should be returned that the defendant is guilty as charged, and the fine fixed only as if there had been but one sale." There was no error in overruling the objection to the admission of the testimony. Evidence of separate offenses may be made to show the intent with which the act charged was done: *Dobson v. State*, 5 Lea, 273. But we think his Honor erred in overruling the motion requiring the attorney general to elect the offense on which he proposed to try the prisoner. The presentment was general, for that the defendant did unlawfully sell an intoxicating beverage, without specifying the person to whom the sale was made, or otherwise limiting the charge to a particular offense. If now, the attorney-general can prove any number of offenses, the defendant would be put at great disadvantage on the trial, and might be deprived of the right to rely upon the acquittal or reversal in defense of another indictment for a similar offense during the same period. It might be in his power to defend against a specific charge, while it would be literally impossible for him to do so where the State was at liberty to introduce proof as to any number of charges. The charge of the trial judge only prevented the defendant from being punished for more than one offense, without securing to him the right to which he was entitled of being tried for one offense alone.

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The judgment of condemnation must also be reversed for another reason. The act of 1877, ch. 23, under which the presentment was found, expressly provides that it shall not apply to the sale of intoxicating liquors within the limits of an incorporated town. The validity of this exception from the terms of the act has been sustained by this court: *State v. Rauscher*, 1 Lea, 96. The defendant was a licensed tippler doing business on the public square in the town of Decaturville. The town was incorporated in 1850, and the charter has never been repealed by the Legislature. The State, however, introduced proof tending to show that the corporation had become extinct by virtue of proceedings taken under the act of 1881, ch. 122. That act provides that whenever twenty-five or more householders or freeholders of any town shall petition the sheriff, he shall hold an election to ascertain the will of the people of the town as to the surrender or non-surrender of their charter. If a majority of the votes cast be in favor of "no charter," it is made the duty of the sheriff to certify the result, and cause a copy of his certificate to be registered in the register's office of the county, and, the act says, "when said certificate is filed for registration, said corporation shall be and become extinct." There was proof tending to show that such an election was held in the town of Decaturville, resulting in a majority of the votes being cast for "no charter," and that the sheriff's certificate of the result was filed in the register's office on the 7th of November, 1881.

Without pausing to consider whether the Legisla-

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lature can thus delegate to the people of a locality the legislative power to abolish municipal charters, the act of 1881, ch. 122, is found to be unconstitutional upon another ground. The constitution, art. 2, sec. 17, is: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title." A majority of the judges of this court have construed this provision to mean that if an act contains more than one subject, and only one subject is expressed in the title, the whole act is a nullity: *State v. McCann*, 4 Lea, 1. I dissented from my brother judges in the conclusion that the particular act under consideration in that case contained more than one subject, and I have grave doubts whether the construction of the clause of the constitution in question adopted in that case is correct. But the opinion is the opinion of the court. The act of 1881, ch. 122, is entitled: "An act prescribing a mode by which municipal corporations may surrender or abolish their charters." The first six sections of the act are directed to this object. But the next three sections undertake to provide a mode by which any municipal corporation may amend its charter. The title and object of the first part of the act is, therefore, the abolishment of municipal charters, while the latter part of the act provides for a change or addition to their powers, and the continuance, instead of the extinction of their existence. No two objects could be more inconsistent, and the latter object is not expressed in the title. The act is, therefore, under the decision cited, unconstitutional and void.

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It is very true, the latter sections of this statute are of the character of that "extraordinary act," as Judge McKinney styled it, which was passed upon in the *State v. Armstrong*, 3 Sneed, 634. They undertake to authorize the board of mayor and aldermen, or other legislative council of the corporation, to prepare amendments of the municipal charter in the manner in which by-laws are adopted, and to submit the same to a vote of the qualified voters of the corporation, and if a majority vote therefor, to cause the same to be registered, whereupon, says the act, "the amendments shall become a part of the charter." The Legislature seems willing to renounce its inherent prerogative to prescribe the powers of municipal corporations, and delegate the authority to the people of the locality. It would be somewhat difficult to sustain the constitutionality of these provisions: *Chadwell ex parte*, 3 Baxt, 98. But it may be equally difficult to sustain the constitutionality of the other provisions. And the entire act falls clearly within the decision in the McCann case.

The judgment will be reversed, and the cause remanded for a new trial.

Gill v. Lattimore.

B. F. GILL v. T. J. LATTIMORE.

PARTNERSHIP. *Division of property among partners. Exemption.* Partnership property cannot be divided between partners and then claimed under the exemption laws so as to defeat the partnership creditor.

FROM OBION.

Appeal in error from the Circuit Court at Union City. C. ADEN, J.

D. D. & JNO. BELL for Gill.

GIBBS & WADDELL, SMITH & MOORE and W. C. CALDWELL for Lattimore.

FREEMAN, J., delivered the opinion of the court.

This is an action of replevin, to recover one horse, a mule, a spring wagon and harness.

The case is this: Steagald & Gill were partners in the family grocery business in the town of Union City. The firm owned two wagons, harness and teams, purchased with funds of the partnership. In May, 1879, the firm failed, and made an assignment of their stock in trade, property and effects for the benefit of their creditors, except these wagons, etc. A few days after this they agreed to divide the two wagons, teams and harness between them, and did so—the other party

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agreeing to pay Gill thirty dollars' difference, in the estimated value of the property received by him.

A few days after this, Lattimore, a judgment creditor of Steagald & Gill, levied on this property, as the property of the firm, and Gill brought this replevin, claiming it as individual property exempt by law from execution in his hands, he being the head of a family. We have held that partnership property is not subject to the claim of exemption under our statute, giving certain property to heads of families, free from execution for the debts of the owner: *Spiro v. Paxton*, 3 Lea, 75.

It may be conceded that either partner may sell his share of the partnership property either to a stranger or to his co-partner, and thus the property cease to be partnership property and become individual, but is this transaction a sale? We think not, and it was not so understood by the parties. It is simply an attempt on the part of the members of the firm to divide the assets of the firm, and hold them in severalty, freed from the partnership liabilities under the exemption laws.

We do not think the partnership creditor can thus be defeated of his right to appropriate the assets of the firm.

Madison County v. Gibbs & Dean.

MADISON COUNTY v. GIBBS & DEAN.

COUNTY COMMISSIONERS. *County liable for work done. When.* Under the provisions of the Revised Code, sec. 1273 a, b, c, which authorize the county court to appoint commissioners to contract for and have completed repairs of bridges, levees, etc., a person who performs work and furnishes material in such repair, with the knowledge and consent of the commissioners, and whose work is accepted and used by the county, may recover from the county what the work and material are reasonably worth, without an express contract by and with the commissioners. COOPER, J., dissenting.

FROM SHELBY.

Appeal from the Law Court of Madison county.
H. W. McCORRY, J.

J. L. BROWN and E. L. BULLOCK for county.

CARUTHERS & MALLORY for Gibbs & Dean.

COOPER, J., delivered the opinion of the court.

Gibbs & Dean sued Madison county for money due them under a contract for work and labor done, and materials furnished by them at the request of the defendant. The county pleaded *nil debet*, and that it did not enter into the contract alleged. The verdict and judgment were for plaintiffs, and defendant appealed in error.

At the October term, 1878, of the county court of Madison county, Gregory, Scarborough and Kendrick were appointed commissioners "to have the levee and

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bridges on Irvine's levee repaired." The clerk of the court in issuing the order inserted the name of Parham, at whose instance with others the order had been made, instead of Gregory, and Parham acted accordingly. In the same month of October, the work on the bridges seems to have been let out by the commissioners to one Smith, who failed to do the work. Afterwards, the plaintiffs were requested by the commissioners to furnish the materials, and perform the work, with an agreement that the value when completed should be determined by two persons, one to be selected by the commissioners and the other by the plaintiffs, they to select a third person in case of disagreement. The work was done, and two persons, selected as agreed, found that the work was worth \$1,305, basing their estimate on the value of county warrants, then selling at fifty cents on the dollar. The commissioners, after the work was done, reported the facts to the county court at its July term, 1879, and that court ordered a county warrant to issue to the plaintiffs for \$650, "in part pay for work on Irvine levee and bridges." There was proof on the part of defendant tending to show that the work was not worth the estimate put upon it, and that the county court did not accept the report for that reason.

By the Revised Code, sec. 1273 *a*, the county courts are authorized to appoint commissioners "to contract for, and have completed" repairs of bridges, levees or causeways. By sec. 1273 *b*, it is made the duty of the commissioners to report to the first term of the quarterly court "after the completion of any work they

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may have had under contract, which report shall set forth the kind of repairs that have been made, by whom made, and for what amount." The next section makes it the duty of the court, upon the filing of the report, "to order the same to be paid as other claims against the county."

The court read to the jury the provisions of the Code, and left it to them to say whether any and what contract was made between the plaintiffs and the defendant, through the authorized agents of the latter acting within the scope of their authority, and instructed them if they found that there was a contract, and that plaintiffs had performed their part of it, they would be entitled to recover the consideration agreed upon; and if they were to be paid in county warrants, the recovery would be for the value of the warrants at the time the money became due, with interest or not as the jury might determine. He further charged: "Should you find that no contract was made between the plaintiffs and defendant, but that the plaintiff performed work and labor, and furnished the materials to make the repairs on Irvine's levee, with the knowledge and consent of the agent of the defendant, and the defendant adopted, accepted and went into the possession and use of the work, the defendant would be bound to pay the plaintiffs what the work, labor and materials were reasonably worth under all the circumstances, whether there was a contract or not."

The latter part of the charge is not literally accurate. His Honor did not mean that the county would be bound to pay for work in the absence of any con-

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tract express or implied. For the facts stated as sufficient to bind the county, namely doing the work with the knowledge and consent of the commissioners and acceptance by the county, would be sufficient from which a contract might be implied. What his Honor meant was that an express contract was not necessary. The counsel of the appellant so understood the charge, and insist that the county cannot be held liable on an implied contract. They argue that it was the duty of the commissioners to fix the price of the work themselves, and that they could not delegate their authority to others. They contend, therefore, that there was no such contract as to the price of the work as to be legally binding on the county. I am myself inclined to the opinion that the statute contemplates the making of contracts for the work at a price fixed in advance, either by letting it out to the lowest bidder, or by the estimates of experts, or by some other mode suitable to the accomplishment of the result. I do not think that the commissioners have any authority so to contract as necessarily to involve the county in litigation. My brother judges are, however, of a different opinion, and concur with the circuit judge in his conclusion that if the work has been done with the knowledge and consent of the commissioners, and *a fortiori* if at their request, and is accepted by the county, the county will be liable to pay what the work, labor and materials were reasonably worth. In this view, there is no error in the charge as made, and there was no request for any other charge.

It is said that Parham was not a lawful commis-

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sioner. But the action of the county court upon the report of the acting commissioners cured any defect in this regard. It is also said that the suit was upon a contract payable in money, and the proof shows a contract payable in county warrants, and that the variance was fatal. But there was no objection made to the admission of evidence on the ground of variance. There was a sweeping exception to "the evidence" of the plaintiff's witnesses, naming them, but such an exception was too general. Besides, the suit would necessarily be for money, even if the contract was for payment in county warrants, and the declaration does not set out a special contract.

Upon the motion for a new trial, the affidavit of one of the jurors is introduced to the effect that each juror agreed that the plaintiffs were entitled to a verdict, but differed as to the amount; that another juror suggested a basis of agreement, to which the affiant says he did not at first accede, and, he somewhat mournfully adds, "he exerted all his mental powers to convince the other jurors to coincide with him, without avail." "Finally," he continues, "to avoid the charge of willful stubbornness, and in opposition to the deliberate conviction previously formed, he agreed that the verdict might be rendered" as it was. Of course, he had the right to change his views to be in accord with those of his eleven obstinate associates. We see nothing wrong in this. The other affidavits disclose nothing which might not have been ascertained by ordinary diligence before the trial.

Affirm the judgment.

Rose v. The State.

ELLIS ROSE v. THE STATE.

CRIMINAL LAW. *Small offense law.* If a defendant is brought before a justice upon a warrant for a felonious assault, the justice, if the defendant be not guilty of the felonious assault, may receive a plea of guilty of an assault and battery and fine the defendant under the small offense law.

FROM FAYETTE.

Appeal in error from the Circuit Court of Fayette county. T. J. FLIPPIN, J.

STAINBACK & RIDDICK for Rose.

ATTORNEY-GENERAL LEA for the State.

McFARLAND, J., delivered the opinion of the court.

The defendant was indicted for an assault and battery, with intent to commit murder. He pleaded not guilty of the felony charged, and to the misdemeanor included in the indictment, to-wit, assault and battery, he pleaded a former conviction before a justice of the peace; the plea, however, showing that the warrant upon which he was brought before the justice charged him with a felonious assault. The attorney-general demurred to the plea upon the grounds: 1st, that upon such a warrant the justice had no jurisdiction to receive a plea of guilty and impose a fine; and 2d, that the plea was in no event an answer to the in-

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dictment. The court sustained the demurrer; the defendant was tried upon the plea of not guilty, acquitted of the felony, but found guilty of assault and battery, and fined \$25, and has appealed in error.

There is no doubt that a plea setting up a valid proceeding in which the defendant has been punished under the small offense law (Code, sec. 4994) is a good plea to the same misdemeanor included in the indictment for a felony. If the case of *Hodges v. The State*, 5 Cold., 7, was intended to hold otherwise, it is not only overruled in this respect by the case of *Mikels v. The State*, 3 Heis., 321, but in addition, the act of 1870-71, ch. 27, sec. 3. Thompson & Steger's Code, sec. 5211*d*, expressly authorizes such a plea. It is not insisted that the former conviction is an answer to the felony charged, but as under such indictments for felony, the defendant may be convicted for the misdemeanor or lesser grade of the offense, he may plead not guilty of the felony and plead the former conviction as to the misdemeanor, so that if he be acquitted of the felony, the former conviction may be a bar to any further punishment for the misdemeanor.

The only question, therefore, to be considered upon this record is whether, according to the averments of the plea, the justice had the jurisdiction to receive a plea of guilty of assault and battery, and punish the defendant under the small offense law? Section 4994 of the Code confers jurisdiction on the justice when "any person is brought before him for a misdemeanor." The plea sets out that the warrant upon which the defendant was brought before the justice, charged him

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with "an assault with intent to kill." Hence it is argued, that under such warrant the justice only had jurisdiction to hold the defendant in custody or under bond to answer for the felony before the circuit or criminal court if the evidence be considered sufficient, or if not, to discharge him altogether. That in the event the justice be of opinion that the evidence is not sufficient to bind the defendant to court upon the felony, but is sufficient to make out the misdemeanor, the justice has, nevertheless, no jurisdiction either to bind the defendant over, or otherwise take jurisdiction of the misdemeanor, without a new warrant charging the misdemeanor; that the sections of the Code 5222, 5223, authorizing conviction for the lesser offenses included in the charge of the greater, do not apply to proceedings before justices of the peace. Such seems to be the reasoning in the case of *Hodges v. The State*, before referred to, but as we have seen, the authority of that case is greatly shaken, if not overthrown, by the case of *Mikels*, 3 Heiskell.

If a person be brought before a justice upon a warrant charging a felonious assault, and the justice upon hearing the evidence be of opinion that a felony has not been committed, but that the defendant is guilty of an assault or assault and battery, we think it may well be said that the person has been brought before the justice "for a misdemeanor," and that the justice has all the jurisdiction conferred in misdemeanor cases, by the very letter of the statute.

It would not be the duty of the justice in such cases to discharge the defendant altogether, nor do we

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see the necessity of a new warrant. The defendant might be held to answer the misdemeanor, and if so, the plea of guilty in a proper case may as well be received as if the warrant had charged only the misdemeanor.

If, as we have seen, it turns out the defendant is really guilty of a felony, he may be indicted and tried accordingly. Or, if the misdemeanor be of the class specified in sec. 5001 of the Code, the justice can only hold the defendant in custody or bonds to answer the charge at court. Or, if the conviction before the justice be collusively had, or has been otherwise improperly conducted, this may be shown upon a replication to the plea.

It may be that inadequate punishment is sometimes administered by justices of the peace in such cases, but this is a matter for the consideration of the Legislature.

If the offense committed be only a misdemeanor, and the party has been punished under a valid proceeding and in accordance with the law, it is contrary to the very letter of the constitution to punish him again.

The judgment must be reversed, the demurrer to the plea overruled, and the case remanded.

Reversed.

Meagher v. Hollenberg.

P. MEAGHER AND WIFE v. H. G. HOLLENBERG.

1. **MARRIED WOMAN.** *Conditional sale.* A married woman contracted with a dealer for the purchase of a piano, and signed an instrument of writing, by which she acknowledged receipt of the piano, at a certain valuation, with right of use, and agreed to purchase it by monthly instalments of a given sum, or more if convenient, a deduction of ten per cent. to be made in the price if paid in twelve months, the title being retained by the dealer until the payments were made in full and at the time agreed, with the right on his part to resume possession in default of payments as stipulated, and in certain other contingencies, the payments, in that event, to be in full for the use of the piano at the rate of the monthly instalments of purchase money. *Held*, that the stipulation to pay rent must be treated as conditional upon the purchaser's election to abandon the purchase, and would not otherwise be binding on her.
2. **SAME.** *Same.* The married woman made payments, but not in accordance with the terms of the contract, and the vendor brought an action of replevin for the piano. *Held*, that the married woman might, by bill in equity, enjoin the action, and have the transaction declared a sale at the price, and upon the terms of payment agreed on, with the legal title retained by the vendor as security for the purchase money, and a decree adjusting rights accordingly.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W.
W. McDOWELL, Ch.

W. M. RANDOLPH for complainants.

H. C. WARRINER for defendant.

COOPER, J., delivered the opinion of the court.

On April 17, 1878, Ellen Meagher, then and now

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the wife of complainant P. Meagher, received from the defendant Hollenberg a piano, signing at the time the following written instrument:

"This certifies that I, Mrs. P. Meagher, of Memphis, Tenn., have received of H. G. Hollenberg, of Memphis, Tenn., one piano, made H. G. Hollenberg style, valued at \$400; that I am at liberty to use the said piano with care, keeping it in good order as when received; that I agree to insure it for the benefit of H. G. Hollenberg for the amount still unpaid; that I have agreed to purchase the said piano by paying on delivery ten dollars cash, the receipt of which is hereby acknowledged, and balance in monthly payments of not less than ten dollars per month—more when convenient. In case of large payments, so that the piano is paid for in twelve month, Mr. Hollenberg is to deduct 10 per cent. That it is further agreed and understood that the right and title of said piano is retained and held by said H. G. Hollenberg until all payments are made in full, and at the time agreed; and that, in default of the regular payments, or if said H. G. Hollenberg shall have reason to deem himself insecure, or I shall sell, or offer for sale, remove or attempt to remove the said piano from my residence without the written consent of H. G. Hollenberg or his agents, then or in either of these cases, he or his agents shall resume actual possession of said piano, and the payments theretofore made shall be in full for the use thereof at the rate of ten dollars per month, which rate I agree to pay for the ordinary use of the piano in case of failure on my part to purchase as

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above agreed. I hereunto set my hand, this 17th day of April, 1878. Ellen Meagher."

Between the date of this contract and the 25th of January, 1881, the complainant, Ellen Meagher, paid the defendant, at various times, and not in monthly instalments as agreed upon, \$183. She made fifteen or more payments in all, five or more of them under \$10 each, two of \$10 each, and six of over that sum each. In October, 1880, she made one payment of \$30, and in November and December, 1880, and January, 1881, she made three several payments, one in each of these months, of \$20. Both parties in their pleadings and testimony agree that the transaction was a sale, Hollenberg expressly saying: "The object was to purchase and not to rent." A previous written contract of hiring of a piano between the same parties is in the record, showing a different form of instrument for that character of contract. The defendant, both in his answer and deposition, states that he frequently, at the instance of Mrs. Meagher, extended the time of payments, and further says, that about the 4th of January, 1881, she begged for further indulgence, and he agreed, upon her promise to perform, that if she would pay him \$50 on the 8th of that month, he would wait three months for the balance, and not claim the piano. On January 11, 1881, she paid \$20 to the defendant's clerk, the defendant being then absent from the State, which was received. The receipts given for payments were usually "on account of piano," or "on piano account." Three were for "rent of piano." On January 25, 1881, the defend-

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ant instituted his action of replevin for the piano. On the next day this bill was filed, enjoining the action at law, and seeking relief upon the ground that the contract was one of sale, the title being retained to secure the purchase money. The chancellor so decreed, and defendant appealed.

The contract was not one of renting with the liberty of purchase. It was clearly a sale and purchase of the piano at a fixed price, to be paid in monthly instalments of not less than ten dollars. The title was retained by the vendor until the purchase money was paid. Such a conditional sale is well known to our law, and valid: *Houston v. Dyche*, Meigs, 76. In such a case, the vendor may, by virtue of his legal title, recover possession of the property at law after breach of the terms of the contract by the vendee, or in equity enforce the payment of the purchase money by a sale of the chattel: *Gambling v. Read*, Meigs, 281. If the purchaser had paid any portion of the purchase money, his interest in the property would enable him to resort to a court of equity, after, and in a proper case before a recovery at law by the vendor, for an adjustment of the relative rights of the parties. The present contract undertakes to give the vendor, in default of regular payments by the vendee, and in other cases specified, the right to resume possession. Such a stipulation would not change the nature of the contract, nor alter the relative rights of the parties.

The written instrument goes a step further, and contains the provision which has occasioned the present

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litigation. It says that in the event the vendor resumes possession, "the payments theretofore made shall be in full for the use thereof at the rate of ten dollars per month, which rate I (the vendee) agree to pay for the ordinary use of the piano in case of failure on my part to purchase as above agreed." But suppose the vendee had paid, as it was agreed she might do, more than the monthly instalment of \$10. Suppose she had paid all the purchase money during the first year, except the last one or two instalments. What then? The contract, or written instrument is silent on the subject. Nor does it contain any stipulation that the contract of sale is to be void upon the election of the vendor to resume possession. In other words, the contract of sale and purchase would still remain in full force, and yet the vendor might retain money paid as rent. But the two contracts, of purchase and rent, are inconsistent with each other. And for this reason some courts have held that in cases of sale and delivery of chattels, an agreement to pay for the use is repugnant to the contract: See *Singer Machine Co. v. Cole*, 4 Lea, 440, where the cases are cited. It is a fundamental rule of construction that all the parts of a written instrument should be treated as intended to be operative. That is to say, such a construction should be adopted as will give effect to all its parts. The primary intent of this contract was to sell. "The object was to purchase, not to rent," says defendant himself. To preserve this intent and this object, the rental clause must be held to be conditional upon the purchaser or the defendant electing

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to avoid the contract of sale. The vendor has not stipulated for this right. It cannot be conceded to him without an express stipulation to that effect, for it would put it in his power to declare the contract of sale at an end after most of the purchase money had been paid, upon the slightest failure to comply with the terms of sale on the part of the vendee. It must, therefore, mean, if she, the vendee, elects to avoid the sale, or abandon the purchase. In that event, it would be proper for her to pay for the use of the piano, and she would have the right to be repaid any surplus of purchase money.

Unless this construction be put upon the contract, the reservation of rent would be in the nature of a penalty or forfeiture, against which equity would relieve under the circumstances. The testimony of the defendant shows a continuous waiver by the defendant of a regular compliance with the terms of the contract on the part of Mrs. Meagher, and an express agreement by him in January, 1881, to accept payment of the purchase money, if made in a given time. And, although the utter failure of the purchaser to comply with the terms of the contract entitles her to nothing more than her strict legal rights, she has acquired by her payments an interest in the piano which the court must recognise.

Another difficulty lies in the way of the defendant in this case. The contract, so far as it is executory by the complainant Ellen Meagher, is void, by reason of her incapacity as a married woman to make it: *Kirby v. Miller*, 4 Cold., 3. She may take title or an

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interest in property by a sale to her, and the vendor, who retains the title or a lien to secure the purchase money, may enforce it against the property: *Willingham v. Leake*, 7 Baxt., 453; *Jackson v. Rutledge*, 3 Lea, 626. The contract of the married woman to turn purchase money, upon a future contingency, into rent, would be executory, and not binding.

The chancellor attained the ends of justice by requiring the complainants to pay into court for the defendant the balance of the purchase money within the time given by the contract. And his decree will be affirmed with costs.

C. M. PEACOCK, Adm'r of M. Peacock, dec'd. v. W. M. WILSON *et al.*

PLEADINGS AND PRACTICE. AT LAW. *Insolvent estate. Appeal from clerk to circuit court. Trial in circuit court.* An account was filed with the clerk against an insolvent estate. Clerk disallowed the account, and an appeal was taken to the circuit court. No issue was there made up. *Held*, that the issue to be tried was the right to recover on the account filed.

FROM LAKE.

Appeal in error from the Circuit Court of Lake county. C. ADEN, J.

Peacock v. Wilson.

L. DONALDSON and J. G. SMITH for Peacock.

COCHRAN & ENLOE for Wilson.

FREEMAN, J., delivered the opinion of the court.

From the meagre record in this case, we infer this is a contest over a claim filed in an insolvent proceeding in Lake county. The claim was disallowed by the clerk of the county court, and appeal taken to the circuit court, where the matter was submitted to a jury under a charge by the court, when a verdict was rendered in favor of the plaintiffs in the sum of \$400.50, from which there is an appeal in error to this court.

It appears from the record that within proper time, the following claim was filed with the clerk of the county court:

“Michael Peacock,

To S. W. Cochran & W. M. Wilson, Dr.

To account of damages due us on account of failure to throw up a levy, to make culverts and otherwise failure to make a good (road) from the west bank of Reelfoot Lake, in Lake county, from Thompson's Ferry landing to the high ground, as per written agreement now on file in the office of the county court clerk for said county. Damages assessed at \$200.”

The above account was verified as just and true, to the best of his knowledge and belief, by W. M. Wilson, one of the plaintiffs.

The clerk after giving notice, as he says, to appear on the 22d of October, 1877, and prove said account,

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which was not done, disallowed the same, from which Cochran & Wilson prosecuted an appeal to the circuit court.

On the trial the plaintiff introduced and read, after proving the signatures to the same, an agreement dated the 21st of January, 1870, between S. W. Cochran, Wm. M. Wilson and Wallace H. Caldwell, and Michael Peacock, the deceased, showing the three parties named had leased to Peacock the ferry privileges across Reelfoot Lake, at what is known as Thompson's ferry, for the term of five years from the 1st of January, 1870. "For the use of which," says the instrument, "the said Peacock agrees to keep up said ferry, provide good substantial boats, and cause it to be well attended for the accommodation of the traveling public. For the use of the same for the first two years of said term, he is to make a good substantial road from the high ground to the landing where the floating palace formerly stood, and keep in repair during the term. He is to throw up a levee four feet high in the low places and run it on a level, and to make culverts sufficient to pass the water, etc." Peacock also agreed to pay one hundred dollars a year for the last three years of said term, payable annually, and the boat at the end of the term was to be the property of the lessors.

Under the several sections of the Code, from sec. 2330 to 2336 inclusive, it is provided substantially, in cases of insolvent estates in county court, that all claims due or not due, after notice by the clerk, shall be filed for allowance, "authenticated as prescribed by

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law." By sec. 2334, the administrator or executor may contest any claim, and urge against the same any defense available in law or equity; and by the next section the "clerk is to adjudicate and determine the same." By sec. 2336, a party dissatisfied with his decision may appeal to the next term of the circuit court, and thereupon the clerk is to certify his decision to the circuit court, where an issue shall be formed, under the direction of the court, as will present the questions for discussion (decision) without writ or declaration, and the judgment thereon, or of the supreme court if an appeal be taken to it, shall be certified back to the county court.

The case stands for trial *de novo* on appeal to the circuit court, as held in *Brien v. Baker, adm'r*, 5 Sneed, 216, upon such issues as shall be formed, under the direction of the court, so as to present the questions for decision.

No formal issues seem to have been made in the circuit court in this case, as required; but assuming that this was a matter of form, and not substance, the question is, can the verdict and judgment be sustained on the state of the case, as presented in this record?

We may treat the account, as filed in the county court, as presenting the claim of plaintiffs, evidenced by the agreement referred to, as showing the basis of the liability therein claimed. This we must do, or else we see no issue in the case which could have been tried. It was this account which was disallowed by the clerk for want of proof, and it was from this

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decision there was an appeal. This question, it is true, was to be tried *de novo* in the circuit court, in this view of the case. The parties might, however, as in other cases, have amended their claim, and formed an issue so as to present all their claims fully in the circuit court, no doubt; but as this was not done, we must treat the issue to be the right to recover on the account as filed.

We take it, that the contract exhibited shows a contract for renting, by which for the first two years, the rent was to be paid by doing the work agreed on, and afterwards for three years, at the rate of one hundred dollars per year. There is absolutely no proof in the record as to what would be the cost of doing the work agreed to be done—on the contrary, the only witness who testified on this subject says he did not know what it was worth.

The court charged the jury, that if Peacock rented the ferry for a given sum per year, they were to return a verdict for plaintiffs, counting interest at the rate of six per cent. per annum from the time you find the amount due to the time of trial.

It appears that Peacock died in 1872, and in 1874 the owners rented it to one Williams, and the court charged, that if this was so found by the jury, they could only give a verdict for what was due up to the time when they repossessed themselves of the ferry—found they did so regain possession.

We cannot see from this record precisely what was the basis of the verdict of the jury, but it is evident they included the value of the rent for the first two

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years. This being so, there is not a particle of evidence on which that part of it can stand. The fact that one hundred dollars per annum was the agreed rent for the years after the levees were made, furnishes no evidence of what the work would have cost, and the right of plaintiffs was to recover this, so that they should be made whole, as if the contract had been performed, and then the money rent, on the facts for the time occupied, at the rate agreed on.

We see from the lease, that it was made with three parties—Waller H. Caldwell being one-third owner. We can hardly see how the other two can recover on their contract, nothing showing that Caldwell had parted with his interest—on the contrary, it appearing he was still owner. This can be amended in the court below, as well as the statement of the case, and an issue formed that shall present the matter in dispute for decision in a more tangible form.

But for the error stated, the judgment must be reversed and case remanded for a new trial.

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JAKE JORDAN v. THE STATE.

CRIMINAL LAW. *Misdemeanor. Punishment.* The act of 1870-71, making it a misdemeanor to enter upon the enclosed lands of another and to "willfully and wantonly destroy, carry away or injure the trees, shrubs, grain, grass, hay, fruit or vegetables there being," must be construed with sec. 4653 of the Code, and the punishment cannot be in excess of three months imprisonment.

FROM MADISON.

Appeal in error from the Law Court of Madison county. H. W. McCORRY, J.

J. L. H. TOMLIN for Jordan.

ATTORNEY-GENERAL LEA for the State.

McFARLAND, J., delivered the opinion of the court.

The defendant has been sentenced by the common law court of Madison county to three hundred and sixty-four days' imprisonment at hard labor in the work-house of the county, and to pay the costs, upon a conviction for a misdemeanor.

The indictment contains two counts: the first charges that the defendant "unlawfully did sever and carry away from the freehold * * * one lot of sweet potatoes of the value of two dollars, the property, etc., * * * under such circumstances as would render said trespass a larceny if the potatoes had been

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personal property." The second count charges that defendant "did unlawfully and willfully enter upon the enclosed lands of," etc. "and sever and carry away one lot of potatoes of the value of two dollars," etc.

Section 4652 of the Code declares various acts to be misdemeanors, as set forth in 18 different sub-sections. Among other things, "To knowingly and maliciously" cut down and destroy valuable timber, etc., sub-sec. 8. "To knowingly and maliciously" destroy or carry away the rails, boards, wood or lumber of another, sub-sec. 9. To willfully and maliciously break down, mar or deface any fence hedge, etc., sub-sec. 10.

Sub-section 15 is as follows: "To enter upon the garden, orchard or improved land of another, and willfully and maliciously to sever, destroy or injure the trees, shrubs, grain, grass, hay, fruit or vegetables there being." Sub-sec. 16, "To sever and carry away from such land any grass, hay, corn, grain, fruit, or other vegetables or produce."

The next section, 4653, provides that the last eight of the foregoing offenses shall be punished by imprisonment not exceeding three months with or without fine.

Thus the law stood under the Code, and the offense designated in sub-section 16—which is the one charged in the indictment according to the law as it then stood—is punishable by imprisonment, but the imprisonment is limited to three months.

The act of 1870-71 amends sub-sections 8, 9 and 10, above referred to, so as to omit the word maliciously and substitute the word willfully or wantonly,

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but it is unnecessary to notice particularly the change. See Revised Code, sec. 4652 *a, b, c*. The 4th section of the act, Code, sec. 4652 *d*, is as follows: "To enter upon the garden, orchard, or improved or enclosed lands of another and willfully or wantonly to sever, destroy, carry away or injure the trees, shrubs, grain, grass, hay, fruit or vegetables there being, shall be declared to be a misdemeanor."

This does not refer to or purport to be an amendment to sub-secs. 15 and 16, of sec. 4652, but it was undoubtedly intended to change the law of these two sections, as changed in the other sections above referred to, by omitting the word "maliciously," which probably applied to both 15 and 16.

It is true this act of 1870-71, sec. 4, does not define the punishment, but simply declares that such acts shall be a misdemeanor. But we think by a fair construction the punishment should be limited, as in section 4653. These sections of the Code and the act of 1870-71 should be construed together. By the latter act the grade of the several offenses, so to speak, is amended by omitting the word "maliciously," and it would be hardly reasonable to suppose that the limit as to punishment was intended to be removed, or a greater punishment was intended to be allowed in the offense defined in the 4th section of the act of 1870-71, than in the last 8 sub-sections of sec. 4652.

The judgment of imprisonment, therefore, in excess of three months will be reversed and corrected.

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WEST TENNESSEE AGRICULTURAL AND MECHANICAL
ASSOCIATION v. R. P. MADISON.

1. PLEADINGS AND PRACTICE. *Attachment. Affidavit. Amendment. Plea in abatement.* An affidavit for attachment before a justice of the peace not subscribed, though certified by the justice before whom made as sworn to and subscribed before him, does not render the attachment void. The defect may be cured by amendment. An appearance and plea to the merits is a waiver of the defect in the indictment.
2. SAME. *Same.* If the defendant appears and pleads to the merits before the justice of the peace, it is too late to file a plea in abatement in the circuit court to which an appeal has been taken.

FROM MADISON.

Appeal in error from the Law Court of Madison county. H. W. McCORRY, J.

CAMPBELL & JACKSON and McCORRY & BOND for Association.

BULLOCK & HAYS for Madison.

DEADERICK, C. J., delivered the opinion of the court.

Plaintiff, by original attachment, sued defendant for \$75, before a justice of the peace of Madison county. The writ was issued upon the affidavit of W. P. Robertson, president, that said Madison was indebted to said association, etc. It is regular in form, except

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that it is not subscribed by Robertson, although the justice attests that it was sworn to and subscribed before him. Bond was executed, and the writ issued and levied on two horses and a wagon. About a month after the levy, the defendant entered his appearance and waived "the time provided for in the order of publication," and both parties agreed to go into the trial of the case, and after hearing the evidence the justice gave judgment for plaintiff, and ordered the sale of the attached property for its satisfaction.

From this judgment defendant appealed to court, and executed a bond replevying the property, conditioned to pay the debt and costs in the event he should be cast therein.

Upon the return of the justice's papers into court, the defendant filed a plea in abatement, denying that "he has removed himself out of the State so that the ordinary process of law cannot be served upon him." The plaintiff moved to strike out said plea, because not filed before the justice who tried the cause. This motion was refused, and upon trial the court discharged the attachment, but rendered judgment for plaintiff for the debt, and defendant has appealed to this court.

Defendant insists that the affidavit not having been signed, rendered all subsequent proceedings void, and that it does not purport to have been made by one authorized to make it. It purports to have been made by W. P. Robertson, Prest. The abbreviation is the usual one for the word president, and the affidavit sufficiently indicates that it was made by the president

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of the association. When the affidavit was actually sworn to, and the clerk fails to attest it, it is not fatal, and the defect may be cured by amendment; so, also, an affidavit certified to be signed, without actual signature, may be amended: 1 King's Dig., 164-5. These omissions are irregular and amendable, and do not render the proceedings void, if defendant appears and pleads. Such appearance and answer or plea to the merits is a waiver of such defects in the affidavit: 12 Heis., 273; *Id.*, 628. If exception had been taken before the justice, the omission could have been corrected.

Matter in abatement is waived by plea to the merits or entering an appearance: 1 Hum., 333; 10 Hum., 455; 3 Sneed, 358; 10 Heis., 504. Appearance and pleading to the merits give jurisdiction of the person in all tribunals. If this be done before a justice, it will be too late to except in the court above: 1 Hum., 332.

It is in the institution of the suit, before the justice, that the suit begins, and there the plea in abatement must be pleaded.

In this case it appears defendant entered his appearance, and agreed to go to trial on the merits. It was, therefore, too late for him to file a plea in abatement in the court to which he appealed, not having made an application to do so before the justice. We are of opinion, therefore, that his Honor erred, in refusing to strike out such plea, and reverse his judgment in this particular, and proceeding to render such judgment as he should have rendered direct, that said

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plea in abatement be stricken out. And his judgment for the debt and costs being affirmed, a judgment will be entered here against said Madison and his sureties on the replevin bond, for the amount of said judgment and costs, and the costs of this court.

J. M. HUDSON, Adm'r. of B. C. Brown v. N. M.
CONWAY *et al.*

SALE OF LAND. *Rescission. Redemption. Dower.* C executed a deed of trust to secure F first, and then B. C died, and then trust was foreclosed. F purchased the land for his debt. B redeemed and sold his interest to the widow of C, and this bill is filed by her, asking to set aside sale upon the ground that she was mistaken as to her right of dower. *Held*, that after ten years' acquiescence in the purchase, a mistake cannot be made the basis of a rescission. There must be made out a clear case of fraud or misplaced confidence. B having conveyed only his interest in the land, the widow is entitled and will be allowed dower.

FROM HENRY.

Appeal from the Chancery Court at Paris. JOHN SOMERS, Ch.

A. McCAMPBELL, CARUTHERS & MALLORY, J. N. THOMASON and J. M. CLARK for Hudson, Adm'r.

COLE & SWEENEY for Conway.

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FREEMAN, J., delivered the opinion of the court.

The original bill was filed to enforce a vendor's lien for balance of unpaid purchase money, the note having been given by the respondent to B. C. Brown of date 13th of April, 1868, the bill having been filed about the 5th of February, 1878, Brown having died in November, 1875.

Respondent files a cross-bill in which she adds that, on the facts stated, that it be decreed, that she had redeemed the land from parties who had purchased under a trust deed, as next friend of her children, and an assumed redemption by Brown should inure to the benefit of her children, as if she had paid the money to the Fraziers, the purchasing creditors, after paying Brown's estate the money due said creditors, and Brown's estate be compelled to account for any balance due on this basis—and her notes given up and cancelled—and if not this specific relief, then for a rescission and dower—and for general relief.

The facts necessary for the understanding of these questions are substantially as follows:

In 1861, Thomas H. Conway, the husband of respondent, made a deed of trust, in which he conveyed the house and lots in controversy, together with a negro woman and children, to one Frazier, to secure certain debts due Frazier, and B. C. Brown, the debts of Frazier being preferred—Brown next; it being then deemed certain that the property was ample security for the amount. During the war Conway was killed, and afterwards, May '26, 1866, the house and lot was

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sold, and three of the Fraziers became purchasers, bidding the amount of the debt of the trustee, Constantine Frazier.

The matter stood thus till the 13th of April, 1868, a little over a month before the time when the right to redeem would expire, when Brown perfected, as he claimed, the right to redeem the land, by depositing the amount of the bid of the Fraziers, with J. M. Hudson, who, we take it, was clerk of the circuit court at the time, though this fact is assumed rather than proven—at any rate, it is certain, that in pursuance of this, the Fraziers, being out of the State, went on and made him a conveyance of the property as upon redemption, and recognized the fact that he had redeemed from them. This conveyance, however, was not actually signed for some months after the 13th of April, the time when Brown claims to have redeemed—but bears that date—evidently the signatures being later, which was caused by delay in getting them to the parties.

We need but say here, that the bill assumes that there was no redemption in fact, or if there was, that Brown had no right, as a creditor by deed of trust, to redeem from the Fraziers until after *sci fa*—based on judgment against the administrator, against the lien.

The principle settled by this court, *Bledsoe et al v. McCorry*, 2 Baxt., 127, that a creditor had the right to redeem without proceeding against the lien, authorizes any party who has such a right under the statute, a creditor by and of trust as well as one by judgment.

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This being so, it is clear, that the Frazier's having submitted to a redemption by Brown, and having conveyed the land to him, he must hold it as such a creditor, and is entitled to all the rights of one, the whole transaction being clearly one in perfect good faith. Assuming this to be true, it is necessary to make an additional statement. On the 13th day of April, 1868, Brown and Mrs. Conway, acting on the assumption that he had so redeemed, had paid Fraziers their money, and held the land as such, having advanced the amount of his own debt on it, making upwards of \$4,300, then on the property, agreed on the purchase of the same by respondent, he taking a small strip off the lots, at an agreed price, and she paying him \$1,000 cash, and giving her note for say \$3,000, with interest from date, promising her that he would never press her for payment, which he seems to have faithfully carried out. Mrs. Conway kept a boarding house, and paid as she could, as appears by sixteen credits on the note in his lifetime, varying from \$30 to \$180, and after his death she paid two additional payments to his administrator. It is very clear, from the proof, that the arrangement was entered into on the part of Brown—who was a man of fortune—to aid Mrs. Conway, at the same time hoping to get his money; the leading idea with her being to secure her home in which she might live with her children, and support them by a boarding establishment. Brown gave her an obligation to make title on payment of her note, reciting the fact that he had redeemed the land, binding himself to convey,

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on such payment, "all his right, title, claim and interest, in and to said lots, and parts of lots, etc." It is assumed in the proof that Brown thought or claimed that the widow was not entitled to dower, and the testimony would probably sustain this view, at the same time this is not clear, as it is shown that her brother took the advice of counsel, Mr. Lamb, before this, who informed him she was entitled to dower, and it is pretty clear she had been told this. The language of the bond seems fairly to imply that he did not claim an absolute, exclusive, unincumbered title to the whole lots, as it only binds to convey "all his right, title, claim and interest."

After about ten years acquiescence in the purchase, and the death of the other party who knew best of the facts—we do not think the mistake—even if it occurred—can be the legal basis on which a rescission could be asked, unless there could be made out a clear case of fraud, or misplaced confidence betrayed by the vendor, and the rights of the vendee either concealed from her, or her eyes closed by her confidence and trust in her vendor.

The fact remaining in doubt, whether she acted on the idea that she was not entitled to dower, and certainly doubtful as to whether Brown so represented, after such acquiescence relief ought not to be given on this ground, especially as it is clear she has not been deprived of any right she possessed, and may still have her dower right intact. In addition to this, her plea of the statute of limitation of six years, protects her from a personal judgment for the balance

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due, and the complainant can only look to the lien for satisfaction.

Without going into the details of the proof, or discussing at length the legal propositions debated by counsel, we think it will suffice to state our conclusion as the result of a careful examination of the record.

We think it clear, that the lot was sold by Brown, and bought by respondent, with the feeling at the time, that it was conferring a benefit on respondent, and with the design to secure her, what was then deemed a valuable home—that he did not intend to press her for payment—and the probability is, that the rents for most of, if not all the time, have been considerably more than the interest. If Brown had lived, we can see clearly, this cross-bill would never have been filed, nor its matter presented before a court. The change of circumstances—unexpected—has, no doubt, colored the views now entertained by respondent, of what actually occurred between the parties, as well as their motives and purposes.

Brown had the legal title, and held it subject to his debt, either as a redeeming creditor or purchaser, with a view of securing his debt. Holding the legal title as he did, with his debt secured by the deed of trust in addition, no court would have, or could rightfully, have divested him of his title, without first discharging his debt, in favor of Conway, had he been alive, nor in favor of his heirs after his death, who stood in his shoes: See *Williams v. Love*, 2 Head, 80-86,

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especially the case of *Johnston, trustee v. Napier et al.*, referred to in that case.

The widow of Conway, proposing to redeem before the expiration of the time of redemption, if she had done so, would have held the land charged with an implied trust in favor of the heirs—subject to a lien for reimbursement: *Clark v. Cantrell et al.*, 3 Head, 202, *et seq.*; but might have so redeemed if she chose for herself after that time. She chose to purchase, in fact, under the circumstances, and as we see no evidence of fraud, and if there was a mistake as to her dower right, inasmuch as that may be given her, we do not think there can be a rescission after the lapse of time, and entire and active acquiescence on her part in what had been done, especially after the death of the vendor.

We think she is entitled to dower in the house and lots, her husband dying before foreclosure.*

The result is, that complainant is entitled to enforce his lien upon the interest by him agreed to be sold, that is, all his own right and title in the lots, but no more, that the widow, the complainant, is entitled to have her dower out of the property, and the same must be either sold subject to her dower, or the same laid off or the dower given out of the proceeds as may be deemed best to her interest by the chancellor. A decree will be drawn in accordance with this opinion, and the case remanded to the chancery court to be further proceeded with. Costs of this

* See foot-note in the case of *Perkins v. McDonald*, 3 Baxt., page 343.

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court will be divided between complainant and defendant, and of the court below, out of the funds. Future costs as the chancellor may direct.

W. R. GRIFFITH v. JAS. L. PHILLIPS.

1. CHANCERY PLEADINGS AND PRACTICE. *Sale of land to pay decedent's debts. Jurisdictional facts.* In a decree for sale of land of decedent's to pay debts, the jurisdictional facts should appear, to-wit, the death of the party, appointment of administrator, the exhaustion of personalty and debts still unpaid. A failure to state whether the sale of a portion or all of the land was necessary to satisfy the debts, is a gross irregularity, for which a decree might be reversed upon a direct proceeding, but will not invalidate the decree or render sale thereunder void.

2. SAME. *Confirmation of sale and vestiture of title.* A confirmation of sale and a vestiture of title "upon payment of purchase money," is in legal effect a vestiture of title.

FROM MADISON.

Appeal in error from the Law Court of Madison county. W. McCORRY, J.

J. L. H. TOMLIN for Griffith.

BULLOCK & HAYS for Phillips.

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FREEMAN, J., delivered the opinion of the court.

This is an action of trespass *quare clausum fregit*, instituted for the purpose of testing the title to a tract of land in Madison county—neither party being in actual possession. Under the charging of the court, and on the facts the jury have found a verdict for plaintiff, and defendant has appealed in error to this court.

The plaintiff introduced certain evidence of a secondary character of the existence of an old grant issued by the State of Tennessee. We need not go into this branch of the case, as the only questions presented in argument, and raised in the record are on the portions of the charge excepted to—only such parts of the charge as are deemed objectionable being brought up for revision. We must assume the parts not brought up, were unobjectionable.

A short statement of facts will serve to raise the questions presented for our decision.

It appears that David McKnight, the grantee, died before 1851, and that a petition was filed by his administrator, and widow, against his heirs, then minors, in the circuit court of Madison county. It appears, however, that the papers have all been lost in the above cause, and after most diligent search, cannot be found.

The records show only three decrees in the cause, the one appointing a guardian *ad litem* to defend for the minors, the next ordering a sale, and then the third decree confirming the sale, and vesting the title. The land was sold on one and two years credit, and the last decree is dated September 2, 1851.

The decree ordering the sale of the land shows it

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was heard on petition, answer of guardian *ad litem*, and exhibits, with a report of the clerk and master; and then recites the personal assets had been exhausted in the payment of the debts, and then proceeds to order a sale of the lands mentioned in the petition. The widow appears to have yielded her dower and agreed to accept its value in lieu, which was ascertained, and directed to be paid to her.

The only objection that can lie to this decree is, that it does not show on its face, by recital, that it was necessary to sell all the lands mentioned, nor what debts nor their amount, remaining due, but only that "there were just debts due and owing from the estate."

The pleadings and decree in a case like this must show the jurisdictional facts, on which the court is authorized to exercise this statutory jurisdiction, as we have always held. But these facts do appear in this case, the death of the party, the appointment of his administrator, the exhaustion of personalty, and debts still unpaid.

It is true the statute requires the court to sell only such lands as may be necessary to satisfy the debts or demands set forth in the petition and shown to exist—which involves an inquiry necessarily as to the amount of the indebtedness; these are but parts of the proceedings, and a failure to comply strictly with these directions, while amounting to a gross irregularity, and reversible on a direct proceeding, cannot rightfully be held to invalidate the decree or render the sale void made under it. That the court should

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proceed with perfect regularity, is not a jurisdictional fact—an irregularity as we have said, but not such as to defeat the jurisdiction—on a collateral objection as made in this case.

In a case like the present, to make an irregularity, however gross, a reason for defeating a bill, acquiesced in for over thirty years by the heirs, would work the grossest injustice. The money has been paid by the purchaser no doubt, and gone as far as needed to the payment of the debts of the ancestor. The land has been sold, in many cases repeatedly, and there is no means of adjusting the equities between the parties. In such a case a most liberal rule should be applied, consistent with settled principles in favor of the validity of such proceedings.

We see nothing but irregularities in the decree before us, and nothing that goes to the jurisdiction of the court to do what it purports to do, and we have always held that mere irregularities do not render a sale void, but only voidable.

It is next insisted that the decree of confirmation does not divest the title, and vest it in the purchaser, except conditionally, and that it does not appear the condition has been performed as far as shown. The title is divested and vested in plain terms, "upon payment of the purchase money," is the language of the decree.

In answer to this, we need but say, that it being over sixteen years, a presumption of payment would arise, which is not rebutted by any proof in this record.

If this were not so, we would construe this lan-

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guage as being in legal effect, but the retention of a lien to secure the purchase money. It certainly was not intended to defeat the vestiture of title plainly expressed in the decree. The case of *Webster v. Hill*, 3 Sneed, 339-40, does not support the view of defendant, as the only question presented or decided in that case was, that a mere confirmation of a report of sale made by the clerk, does not *ipso facto* vest the legal title.

As to the failure to introduce the petition and other papers in the cause, we do not think any inference as to the invalidity of the proceeding can be drawn in favor of the defendant in this case.

The absence and loss of the papers is accounted for, and the decrees show very clearly what their substantial matter must have been. Besides, in such a case, after such a lapse of time, and in view of the ravages of the war, by which so many of our public records were destroyed, any presumption should be given in favor of the regularity of the proceedings of our courts, where nothing to the contrary appears.

As to the question of statute of limitations, based on the assumed adverse holding by defendant, by user, in cutting timber on the land for rail and fire wood, his Honor's charge was strictly correct, as applicable to the facts of the case. If the jury had found there was such an adverse holding, on the facts in the proof, it would have been the duty of the court below to have granted a new trial, and even of this court, as there is absolutely no evidence on which such possession as the law requires, could have been sustained.

On the whole case we think it was correctly adjudged, and affirm the same.

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JOHN TOUHEY v. D. H. KING.

JUSTICES OF THE PEACE. *Offenses committed in their presence. Commitment to prison.* The magistrate may order the arrest of any one for a public offense committed in his presence, but he has no power, without an examination or hearing, to commit him to prison. If there be good cause for postponing the hearing, the offender may give bail in a bailable case. If he fail or refuse to give bail, then he may be committed to prison.

FROM MADISON.

Appeal in error from the Law Court of Madison county. H. W. MCCORRY, J.

R. W. HAYNES for Touhey.

A. W. CAMPBELL for King.

McFARLAND, J., delivered the opinion of the court.

This is an action for false imprisonment in which the judgment was for the defendant. The plaintiff has appealed in error.

The defendant pleaded, first, not guilty; second, that he was, at the time, mayor of the city of Jackson, and as such, by law, had police authorities over the grounds of the Madison County Agricultural and Mechanical Association, commonly known as the "fair grounds," situated within one mile of the city, and "while the 'fair' was in progress, the plaintiff was guilty of violating the rules and regulations of said

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Association, on the grounds thereof, and of otherwise demeaning himself in a disorderly way," for which the defendant caused him to be arrested and imprisoned, etc. Third, the defendant pleads that he was one of the directors of said Agricultural and Mechanical Association, and as such had police jurisdiction over the "fair grounds," for the purpose of preserving order thereon, and that the plaintiff was there and then deporting himself in a disorderly manner, and in violation of the rules and ordinances of said Association, whereby he subjected himself to the arrest of which he complains. There was issue upon the several pleas.

The proof shows that the plaintiff, on the afternoon of the 27th of September, 1875, drove out in his buggy with a pair of horses from the city of Jackson, to the "fair grounds," and very soon after going inside the grounds he was arrested by order of the defendant, brought back to the city on foot, put in the calaboose and kept until after dark, when he was released by the chief of police of the city.

Seawell, who made the arrest, says: "I was on police duty at the fair grounds in 1875 at time of plaintiff's arrest." * * "We had our orders from defendant, D. H. King, who was then mayor of Jackson." * * "Mr. King said something about plaintiff going on the grounds, and told me to arrest him and take him to the station-house, and turn his team over to some body to put in the livery stable. It was some time in the afternoon, not far from three o'clock, I turned the team over to some one who

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brought it to the livery stable, and I locked the plaintiff up." He then gives the names of other policemen who he thinks assisted him, and adds: "Touhey was arrested for driving his team where he was not allowed by the regulations of the Fair Association. I thought he was under the influence of whisky, but cannot say he was what you would call drunk. He told me when I arrested him if I would let him go he would go out and leave the grounds. I told him if King said so it was all right. He went over to see King, do not know what passed between them, but he was not released but was sent on to the station-house." Witness then gives further details of the arrest and describes the grounds and the place where the arrest was made, and proves that horses and vehicles were not allowed at that place.

The plaintiff himself testifies, among other things, that when arrested by Seawell, he asked him what he had done, and was told by Seawell that he did not know, but that it was defendant's orders. He proposed to leave the grounds and was told to see defendant, and whatever he said would be all right. He went to where defendant was and asked him what he had done. The only reply defendant made was to call to two of the policemen and order them to take plaintiff to the calaboose and lock him up. Plaintiff again repeated the question, and the same order was given to the policemen with an oath, and he was then taken by the policemen to the calaboose. The defendant was not examined as a witness.

It is shown that about six o'clock, McCabe, the

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chief of police, released the plaintiff. This was done at the instance of H. D. Barnell, who agreed to be responsible for plaintiff's appearance at the recorder's office at nine o'clock next morning. McCabe told defendant the same night that he had released plaintiff, and defendant said he was glad of it. Plaintiff met defendant next morning but did not go to the recorder's office. No warrant was at any time taken out, nor other steps in the way of a prosecution.

No written regulations or by-laws of the Association were introduced, but the oral testimony was that plaintiff was driving his team at a place where teams were not allowed, and some two or three witnesses for the defendant testified that he was driving rapidly and recklessly, and that there was a large number of people present.

There is conflict in the proof as to whether or not he was drunk. There is proof tending to show that when plaintiff was notified that he was driving at the wrong place, he turned back.

Among other things the judge instructed the jury that "It is a misdemeanor at common law, and in this State, for a person to disturb the public order and tranquility," also, "to drive a vehicle recklessly or riotously and through a crowd of people to the hazard of their safety, and more especially is this the case if such driving be done at a fair within bounds set apart for the entertainment of people on foot, and vehicles are forbidden there. And in case of misdemeanors, when committed in presence of magistrates, they have the power to cause the arrest of the party

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without warrants, *and to commit to imprisonment*. The mayor of a town is a magistrate under our law, and if you find the defendant was at the time of the arrest the mayor, and that the plaintiff was driving his team in a reckless manner upon the "fair grounds," within the part allowed to the people for entertainment, and to the endangerment of their safety, it was not only proper, but the duty of the defendant to cause his arrest and ejection from the grounds, and if the imprisonment was not continued beyond a reasonable time in which the plaintiff could have been brought to trial, and if he was discharged when he offered security for his appearance to answer the charge, the defendant would not be guilty."

He refused to charge, at plaintiff's request, that if plaintiff was kept in prison several hours and not brought to trial after being discharged, defendant would be a trespasser *ab initio*.

The verdict was, no doubt, upon the ground that the plaintiff was guilty of a common law misdemeanor in driving his team recklessly in the forbidden parts of the fair ground to the danger of the people there assembled, and this being in the presence of the defendant, he, as a magistrate, was justified in ordering his arrest and imprisonment without warrants.

Neither of the special pleas under which the defendant undertook to justify the arrest set up this defense. They do not distinctly aver that the plaintiff had committed any criminal offense or misdemeanor against the laws of the State. The first of these several pleas avers that the plaintiff "was guilty

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of violating the rules and regulations of said Association on the grounds thereof, and of otherwise demeaning himself in a disorderly way." The other is in substance the same, that is to say, "that the plaintiff was then and there deporting himself in a disorderly way and in violation of the rules and regulations of the Association." Neither of these pleas aver, with sufficient certainty, that the plaintiff had committed any offense justifying his arrest, either with or without a warrant.

It has not been shown that it is a misdemeanor to violate the rules and regulations of the Association, and the averment that he was demeaning or deporting himself in a disorderly way, is altogether too general, to show the commission of a misdemeanor. At any rate, the pleas do not aver that the plaintiff had been guilty, in the presence of the defendant, of committing the misdemeanor defined in the charge, of recklessly driving his team of horses among a crowd of people.

But if this defense were properly pleaded is the charge correct? Has a magistrate the power, when a misdemeanor is committed in his presence, to cause the arrest of the offender *and commit him to imprisonment?*

"Where a public offense is committed in the presence of a magistrate, he may, by verbal or written order, command any person to arrest the offender, and may therefore proceed as if he had been brought before him on a warrant of arrest": Code, sec. 5036.

That is to say, he may proceed to a hearing and

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examination of the case, and to deal with the offender according to law. But "no person can be committed to prison for any criminal matter until examination be first had before some magistrate": Code, sec. 5017.

And "when the defendant is brought before a magistrate, either with or without a warrant, on a charge of having committed a public offense, the magistrate shall inform him of the offense with which he is charged, and to his right to the aid of counsel in every stage of the proceeding": Code, sec. 5048.

"The magistrate shall, as soon as may be after the defendant appears, or if the defendant require the aid of counsel, after waiting a reasonable time therefor, proceed to examine the case": Code, sec. 5050.

"The magistrate may, however, for good cause, adjourn the examination from time to time, without the consent of the defendant, not exceeding three days at any one time": Code, sec. 5051.

"And if in such case the offense is not bailable, or if the defendant does not give the bail required, he shall be committed to jail in the meantime, and if the offense is bailable, the defendant may give bail in such sum as the magistrate directs, for his appearance for such further examination": Code, sec. 5052.

While, therefore, a magistrate may order the arrest of any one for a public offense committed in his presence, he has no power to at once, without an examination or hearing, or without informing the offender of the charge against him, commit him to prison. If there be good cause for postponing the

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hearing, and the offender fail to give bail in a bailable case, then he may be committed until the hearing. But for a magistrate to order the arrest of any one for a misdemeanor committed in his presence, and at once without a hearing, or without cause postponing the hearing to another time, or giving him an opportunity to have counsel or give bail, peremptorily order him to prison is contrary to the very spirit of our bill of rights and the pointed provisions of our statutes.

We do not mean to abridge the power of officers to arrest and hold offenders in custody until their cases are brought to a hearing. But the magistrate has no power except as above indicated, to order them to prison in advance of a hearing. And where one is arrested without warrant—committed to prison without a hearing—and then discharged without other steps being taken against him to bring the case to a hearing, the person making or causing the arrest, will, according to some of the authorities, be a trespasser *ab initio* without regard to whether the person imprisoned may or may not have committed an offense: *State v. Parker*, (75 N. C.,) 22 Am. Rep., 669; *Broach v. Stanton* (108 Mass.,) 11 Am. 390. But this must not be understood as meaning that an arrest and prosecution cannot be abandoned without rendering the officer liable as a trespasser from the beginning. If the arrest, in the first instance, be lawful, and it be not carried to the extent of an unauthorized and illegal commitment to prison, then if by consent or the leniency of the officer, the of-

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fender be released without other steps being taken, the officer would not be liable.

Whether or not his Honor meant to say that a magistrate has the power to order the arrest of anyone for the commission of a misdemeanor in his presence and to commit him to prison without a hearing, the language has this construction, and it was probably so understood by the jury, as there is no reference to the duty of the magistrate to proceed to examine the case or to allow the offender to give bail, if the hearing be postponed. We think the charge as applied to the pleading and proof, is erroneous in the particulars indicated.

The judgment must therefore be reversed and the cause remanded for a new trial.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1882.

CHRISTOPHER SCHULTZ *et al* v. JNO. D. BLACK-
FORD *et al*.

CHANCERY PLEADINGS AND PRACTICE. *Sales to enforce trusts. Advance bids.* Chancery, at the instance of a creditor and over the protest of the trustee, will sell land previously conveyed in trust to secure other creditors, and apply the surplus to the satisfaction of the claims of complainant creditors. Such sales will be opened upon advanced bids and possess all other incidents of chancery sales. It is proper, but not necessary, for the court to appoint the trustee as special commissioner to sell the land. COOPER, J., dissenting.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga
W. M. BRADFORD, Ch.

L. B. HEADRICK and BARTON & SON for com-
plainant.

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HALBERT B. CASE for trustee.

FREEMAN, J., delivered the opinion of the court.

This case is before us, as to Jno. D. Blackford, the mortagor, on appeal, and as to complainant, Shultz, by writ of error.

The bill is filed by Shultz, a creditor of Blackford, by judgment, including costs, amounting to about \$80, on the following state of facts:

Blackford had conveyed the tract of land, near the city of Chattanooga, to Case, in trust, to secure a debt of some six hundred dollars. This conveyance was made in March, 1878, the note having twelve months to run, the property to be sold by the trustee in case of default of payment. The debt was not paid, and the trust not executed, or any steps taken to do so, when, on the 3d of March, 1881, this bill was filed to have the trust enforced, the land sold, and any surplus arising from the sale, appropriated to the payment of complainant's debt. Some weeks after service of process, the trustee advertised the property for sale under the power contained in the deed. Thereupon, the trustee and creditor, under the deed of trust, filed their answer, in which the fact that the property was then advertised for sale is stated, and the trustee insists on his right to proceed with said sale under the power, and declines to waive his right to execute the trust and pay the note and expenses out of proceeds of the sale. The trustee, however, says that if the land so sold shall

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bring more than enough to pay the debt and expenses of the trust, he is willing to pay the balance into court to be disposed of under the orders of the court.

The bill having been taken for confessed as to Blackford, was heard as to the other parties, when the chancellor declared a lien in favor of complainants, on the surplus, by virtue of their bill. He recognized the right of the trustee, however, to refuse to permit the sale to be made by the court, or under its direction, and simply declares the lien and makes his decree on the assumption, that inasmuch as the party had submitted to pay over the surplus to be dispensed of by the court, he could dispose of this, and so directs it, when paid, to be paid over to complainant. Case, the trustee, on this basis is ordered to pay the surplus into court, after paying debt and expenses of trust. He, however, then proceeds to declare that, if the trustee fail to sell under the deed of trust within three months, the master shall proceed to sell the land and pay off the prior liens, and complainant's debt, and if the debt is not paid by this process, he then orders execution to issue for any balance remaining unpaid.

The latter part of this decree antagonizes the assumption of the first part, that the trustee had the right to refuse to allow the sale to be made by the court, if literally construed, because it does not propose to do so in case of failure to sell within the time prescribed by the court. It was contended, that the court simply meant to allow the trustee to sell

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subject to the order of the court as to the time in which it should be done, and when his sale was reported and surplus ascertained, then the appropriation to be made. That the trustee was of necessity to be in some degree under the direction of the court is seen, by supposing that after the sale he had refused or failed to report as required, it could not be questioned that it would have been the right and duty of the court to compel him to make said report, and pay into court such surplus—otherwise the court had made a decree which it could not have executed, which would be absurd.

Passing from this, the real question in the case is, whether the court erred in holding and decreeing, that upon the refusal of the trustee, and his insisting on his right to proceed with the sale under the power, after complainant had filed his bill, there was error? This is the turning point in the case, because the refusal of the court to open the biddings was based on the proposition that the sale was one the court had no control over—not made under its decree—and therefore the court had no jurisdiction over the sale, and no authority to act on the application to open the biddings. He thus construed his own decree and acted on it.

It has been held by this court, in the case of *Fulgum v. Cotton*, after careful consideration, that a judgment creditor had the right, without the consent of the mortgagee, or any prior encumbrancer, to file a bill, have the mortgage or trust enforced, an account taken of the mortgage or trust debt, and the prop-

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erty sold for the payment of the debt secured, and after paying expenses of the trust, and secured debt, the surplus to be appropriated by a decree of the court to his own judgment.

The principle of this case had been announced by this court in 1832, *Cloud v. Hamilton & Litton*, 3 Yer., 81), the Chief Justice saying: "Our practice is to sell in aid of the execution at law, giving the equitable owner and debtor time and leave to satisfy the debt, when, if this be done, the bill is dismissed, and all collateral litigation arising incidently among defendants ceases." He further stated the rule that if the prior incumbrancer desired relief independent of the judgment complainant, his remedy was either by a cross-bill, or an original bill to enforce his encumbrance. We should say a bill in this nature of a cross-bill is the appropriate remedy. The like practice is suggested in the opinion of Judge McFarland, in the case of *Fulgum v. Cotton*, 6 Lea, 590, where it is said the mortgagee or encumbrancer should not be delayed, but allowed to proceed to sell either under his power or decree of the court, leaving the other parties to litigate over the proceeds.

The principle conceding that a creditor of the mortgagee has rights as against the property of his debtor, though mortgaged, is implied in the holding of the English courts, that after an account had, and decree of foreclosure to which subsequent creditors are not parties, an allegation and proof of collusion in taking the account, it will be opened at the suit of such creditor, in order that the property shall only

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be charged with the true sum due: See *Roran v. Mercer*, 10 Hum., 361-2, and cases cited.

If these principles are conceded, then it follows, that on such a bill as the present the complainant has the right to have the trust enforced under the decree of the court, the account taken in the first place, and the whole sale subject to the direction of the court in order that it be fairly done, and his rights protected and enforced. It was so held in the case referred to, 6 Lea, 601, and for the sound reason that, "to allow the mortgagee to proceed to sell under the power, independent of the control of the court, would put it in his power to defeat the right of the complainant in the bill entirely, and even to allow him to file a separate independent bill, might have the same effect, the complainant having no power to compel the party to proceed in such independent case. In fact, if the right to file the bill by the creditor is allowed, and to enforce the trust in order to the ascertainment and appropriation of the surplus, then it must be enforced independent of the trustee or prior encumbrancer, for if subjected to his option or consent, then it is not a right, but only a permission, and could not be enforced at all.

We therefore conclude in accord with the case of *Fulgum v. Cotton*, that if the decree of the chancellor is rightly construed by him, as not ordering a sale, and the sale not made under complainant's bill, then it was erroneous, and complainant was entitled to have a sale made under the direction of the court, and subject to its revision and control. Such a sale

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as would be subject to all the incidents of a chancery sale. We do not mean to say, it is imperative that the court should take the sale out of the hands of the trustee, where he is willing or desires to make it. It being an execution of the trust by decree of the court, he may well be directed by the court to make the sale, and be appointed special commissioner, if need be, for this purpose. But the sale should be made under the decree of the court, and as we have said, subject to all the incidental control and direction in ordinary chancery sales.

This case well illustrates the necessity of the rule we have stated. It is clearly shown that the property has been sold at a great disadvantage, that the creditor, who alone bid for it, has obtained it at a large undervaluation; for one piece an advance bid is offered in cash of fifty per cent, yet the chancellor held he had no power to give relief because the sale was not made by, or under the direction of the court. It is made in the course of a proceeding properly instituted, in which the complainant was legally entitled to have the land sold; and yet the chancellor has refused the relief and permitted a sale by the trustee, where the rights of complainant are ignored, and may be sacrificed.

The result is the original decree will be reversed, and a resale ordered in accord with the terms and enforcement of the trust. The respondents, Sifers and Case, will pay the costs of this court. Costs of court below to be disposed of by the chancellor in final disposition of the case.

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COOPER, J., delivered the following dissenting opinion:

I am unable to concur with my brother judges in the conclusion reached in this case. The mortgagee declined in his answer to assent to a sale by the court of his interest in the mortgaged property, and insisted upon his right to sell under the power conferred by the contract. I am of opinion that the court has no authority to interfere with the obligation of a valid contract of mortgage, except upon the application of one of the contracting parties upon good cause shown, or upon the application of some person legally entitled to be subrogated to the shoes of one of the contracting parties, and then only the extent of the rights of such party. It is upon the latter ground that a creditor of the mortgageor is permitted to redeem by the payment of the mortgage debt whenever the mortgageor might thus redeem. The creditor cannot claim any higher or different rights than those of the debtor whose interest he is seeking to subject. He may sell the entire estate with the assent of the mortgagee, for the latter is entitled to such a sale. There is no authority for anything further in *Cloud v. Hamilton*, 3 Yer., 81. In that case the lien creditor acquiesced in the decree of sale. That decree, it sufficiently appears, was that the debtor pay the complainant's debt within a given time, and on failure that the land be sold. Under this decree, the lien creditor might be deprived of its benefits either by a voluntary dismissal of the bill by the complainant, or by the payment by the debtor of the com-

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plainant's debt before a sale. The lien creditor, therefore, moved the court that the decree be modified so as to require the debtor to pay the lien debt first within a given time, and on failure, that the land be sold in satisfaction of that debt. But the court declined to make the modification because the lien creditor could only entitle himself to such relief by a bill filed for the purpose. It has been repeatedly held by this court that a mortgagee may enforce his rights without reference to either prior or subsequent encumbrancers: *Mims v. Mims*, 1 Hum., 425; *Rowan v. Mercer*, 10 Hum., 359; *Fletcher v. Coleman*, 2 Head, 384. It is difficult to see how a creditor can, by the mere filing of a bill, to reach his debtor's equity of redemption, acquire a higher right than an encumbrancer by contract or by judgment. The mortgagee, it seems to me, still has the right to execute, or enforce his contract according to its terms. To cut down the security by the costs of a judicial proceeding and sale when the contract stipulates for a different mode, which neither of the contracting parties seeks legally to interfere with, seems to me to be an unauthorized violation of contract rights. I concede that the present decision is in accord with the principles enunciated in *Fulgum v. Cotton*, 6 Lea, 590. I was incompetent to sit in that case and did not participate in the decision. I dissent, respectfully, from its rulings, and from the opinion sanctioned by the majority of the court in the present case.

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JACOB CARTER v. THE STATE.

CRIMINAL LAW. *Misconduct of jury. New trial.* A verdict will be set aside and a new trial awarded, where the officer in charge of a jury on a trial for murder, permits them to read a newspaper article about the trial of the case.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. D. C. TREWHITT, J.

LEWIS SHEPHERD and W. L. EAKEN for Carter.

ATTORNEY-GENERAL LEA for the State

DEADERICK, C. J., delivered the opinion of the court.

Carter was convicted in the circuit court of Hamilton county, of voluntary manslaughter and sentenced to seven years imprisonment in the penitentiary of the State, and has appealed to this court.

The bill of exceptions embraces only the affidavits of [defendant, some of the jurors, and others, which were read in support of the motion for a new trial, and counter affidavits introduced by the State.

None of the evidence adduced upon the trial, is contained in the record, and of course we presume it was sufficient to support the verdict.

The application seems, from the record, to be founded solely upon the imputed misconduct of the jury in re-

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ceiving and reading newspaper notices of the homicide and incidents of the trial, which were not in evidence.

Some attempt is also made to show that there were improper communications between some of the jury and other persons. But the facts disclosed by the affidavits, do not support this charge. We have not been furnished with any brief, or memorandum, from either the prosecution or defense.

The trial began April 1, and ended April 4, 1882, and defendant's affidavit states that on the 2d of April an article appeared in the "Chattanooga Times," written or furnished by Mr. Everett, one of the counsel for the prosecution, purporting to give a "history of the homicide for which affiant was on trial," and "to give the facts of affiant's connection with said homicide."

The article is set out in the affidavit and is headed: "The Evans Murder—After four years of delay the accused murderer, is at last on trial." The article gives the names of the jury, and the counsel engaged in the cause, and then states Evans was killed while returning from a corn husking; that he was waylaid and received nearly one hundred shots in his body. That Carter (the defendant), three England brothers and John Goldstein, were suspected of having done the deed through mere wantonness, but the four last succeeded in escaping.

The article further states that the trial had been delayed for four years on account of the failure of Carter's father, who was one of the most important witnesses against him, to appear; and that he was arrested on at-

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tachment and placed in jail six months ago, to secure his attendance. A circumstantial account of the robbery of a train by the James gang, detailed by one of the gang, appeared in the same paper, and is set out in full. Also a further account of the murder of Evans, appeared in the same paper the next day, 3d of April.

The proof of the publication of the articles substantially as stated, is satisfactory. And if such publication was, in fact, in the hands of the jury, and read by them, or any of them, we think it would be sufficient reason for granting a new trial. It is well established by repeated adjudications of this court, that the verdict of the jury must be founded alone upon the evidence delivered in open court in the presence of the judge and the parties: 1 Swan, 63; 6 Hum., 275; 1 Baxt., 241; 3 Wh., sec. 3136.

At an early day, it was held if the jury receive papers not submitted in evidence, and a conviction is had, whatever the papers may be, a new trial should be granted, unless defendant occasioned the error: 3 Wharton, sec. 3136, citing 2 Hale P. C., 308; 5 Mass., 405. Subsequently this doctrine was modified in Massachusetts, and it was held that where a paper was taken out by the jury by accident, and it was shown that it was not opened, the verdict was not vitiated: 5 Pick., 296. And where articles referring to the case on trial, were cut out of newspapers by the officer, and the papers were then handed to the jury, it was held that this was an irregularity in the officer, but did not vitiate the verdict: 3 Wharton C. L., sec. 3137.

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The question then, for our determination is, were these article, or any of them, in relation to this homicide, before the jury?

Defendant introduced, in corroboration of his own statement, the affidavits of Jas. L. Whiteside, V. S. Whiteside, Thomas Crews, E. A. Norris and Geo. W. Ochs. The first four named, being jurors in the case, and Ochs the person who published the article, or reported it for publication. Jas. L. Whiteside stated that the deputy sheriff who had the jury in charge, furnished them two copies of the "Times" of 2d of April. After cutting out the article heretofore referred to, in relation to the killing of Evans and the trial of Carter, and the arrest and imprisonment of his father as a witness, he handed the slips cut out to H. F. Rogers, who laid it, or them, on the counter of the cigar stand at the hotel where the jury were staying; that he, Jas. L., took up the slip and read it and handed it to another member of the jury. The article was the same headed the "Evans Murder." He states that on the next day, 3d of April, the officer purchased some copies of the "Times" of that date, containing an article about the defendant, that he cut this article out of the papers and tore it up, throwing the pieces down, and he, affiant, picked up some of the pieces, but could not place them so as to read the article.

V. S. Whiteside states that on the 2d of April, the officer bought some copies of the "Times" of that date, cut out the article referred to, and left the article lying on the counter in the office of the hotel;

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that Jas. L. Whiteside, another juror, picked up the slip which had been cut from the paper, and affiant, and Jas. L., and several other jurors read it, while the trial was in progress; affiant also states that he picked up a "Times" of the 2d of April, from a table in the court room, which had not been cut, and read the same article in that paper. He and Jas. L. both state that they were not aware that there was anything wrong in reading that article while they were on the jury.

Thomas Crews says he saw the officer cut the slips from the "Times" of the 2d of April, and hand them to H. F. Rogers, and he saw Jas. L. Whiteside reading said slip, and his best impression is that jurors E. A. Norris and V. L. Whiteside also read it. Norris had the slips after the trial and showed it to affiant.

E. A. Norris says on 2d of April the officer having charge of the jury purchased several copies of the "Times" of that date, and cut out the article referring to the trial of defendant, and handed the papers to the jury; that one or more of the slips cut out were placed upon the counter of the hotel, and that Jas. L. Whiteside and several other jurors, got possession of said article or articles, and read their contents; that next day, the 3d of April, the officer purchased some papers of that date, containing an article about the prisoner's connection with the homicide, which he cut out of the papers, and tore up, and the pieces were picked up by said Jas. L. Whiteside, and preserved by him.

Ochs states that the facts published in his paper

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were furnished by Everett, counsel in the prosecution.

Six other jurors, with more or less of positiveness, and the officer in charge states that the slips cut out of the newspapers were destroyed, and none of them were read by any of the jurors.

One of these jurors, in an explanatory affidavit, says he does not mean to say that the four jurors introduced by defendant, might not have seen, or read the slips, but if they did, he did not know it, and as to the other five jurors, their statements, might well, in like manner, be qualified.

Although the probabilities are, that all the jurors would have noticed the slips in the hands of their fellow-jurors; yet, as there were amongst them some five or six mutilated copies of the "Times" of the 2d and 3d of April, it is not incredible that a slip might have been read before them without attracting special attention—at all events, four of the jurors speaking from their personal knowledge, so testify. They are not impeached, only so far as the presumed contradiction as to the facts of other jurors and the officer, may be supposed to be an impeachment.

The officer says that he tore up the slips from the three papers furnished the jury on the 2d of April, and that he did not place any of them on the counter. Jas. L. says that the officer handed the slips to H. F. Rogers, who put them on the counter. V. S. Whiteside says the officer left the slips lying upon the counter. Crews said the officer handed the slips to Rogers. Norris says one or more of these slips were placed upon the hotel counter. Rogers says he

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did not put the slips on the counter, but his impression is that Phillips (the officer), laid one of them on the counter.

None of these witnesses speak of the officer tearing up and throwing away the slips of the 2d of April, and of Jas. L. Whiteside picking them up and trying to fit the pieces together. But they do speak of these things having been done on the 3d of April.

Under the well established rules of evidence, we are of opinion that the weight of it is in favor of the proposition that a part of the jury read the articles on the 2d of April commenting upon the case, and that the comments were calculated to prejudice the defendant. And it is well settled, if facts are illegally before the jury, which may have prejudiced the prisoner, he is entitled to a new trial.

The value of jury trial depends upon guarding jurors against any and every influence, other than such as arises from evidence legitimately before them.

We are of opinion, therefore, that the Circuit Judge erred in refusing a new trial, and his judgment will be reversed and the cause remanded for a new trial.

McFARLAND, J., delivered the following dissenting opinion:

I am constrained to announce my dissent from the opinion of the majority of the court in this case.

Conceding that the affidavits are sufficient to show that some of the jury read one of the newspaper ar-

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ticles, I cannot see that we ought to assume that they were, or even might have been thereby prejudiced against the prisoner. I grant that every one accused of a crime is entitled to a fair and impartial trial, and to this end the trial should be by an unprejudiced jury, and alone upon the evidence introduced in open court, and where there has been any departure from this rule, the verdict should be set aside.

I do not discover anything in the newspaper article in question of an inflammatory character or calculated to prejudice the prisoner's case with the jury, especially if we assume that they possessed even a moderate degree of intelligence and honesty. The article contains nothing to indicate the drift of public opinion as to the prisoner's guilt, and nothing as to his character, calculated to create prejudice against him. It purports mainly to be a history of the progress of the trial, a matter about which the jury were certainly as well informed as the author of the article. If it purports to state any facts pertinent to the issue before the jury, they are certainly stated in very general terms. The jurors must be supposed to know that a newspaper reporter in an article of this character is not speaking from a personal knowledge of the facts. Before they enter the jury box they take a solemn oath that they have not formed or expressed any opinion. They are again solemnly sworn to try the case upon the law and evidence. It is fair to presume that the witnesses having a knowledge of the facts are examined in court, where their testimony is subjected to the test of cross examination and argument of coun-

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sel. The jury are universally cautioned by the presiding judge to determine the case alone upon the evidence, and to disregard all outside influences. After all this, to suppose that a jury could, in any degree, be influenced in their verdict by a newspaper article containing nothing more than the one in question, is to attribute to them a degree of weakness scarcely consistent with their fitness for their position. Besides, the defendant has not seen proper to take a general bill of exceptions, setting out the evidence upon which he was convicted, so as to enable this court to see whether his case was so doubtful as to admit of the scales being turned against him by so slight a weight.

The fact that the newspaper reporter obtained his information from one of the prosecuting attorneys, is of no consequence, as there is no reason to suppose that there was any purpose on his part to tamper with the jury or to influence them. It would be as easy to suppose that it was a device upon the part of the defense to obtain a new trial in the event of a conviction, but I see no ground for either supposition.

The right of the accused to an impartial trial should be faithfully guarded, but there is danger that in our anxiety to do so we may sometimes fail to render due protection to the public, and throw such obstacles in the way of the execution of the criminal law, as to greatly impair its efficiency.

I therefore respectfully dissent from the majority opinion.

COOPER, J., concurs in this dissent.

White & Depue v. Lea.

W. O. WHITE and CHAS. W. DEPUE v. JNO. A. LEA, Sr.

PLEADINGS AND PRACTICE. *Counterpart writ. Justice's judgment.* Suit was brought before a justice against partners in a county where only one of them resided. A writ was issued to another county, where the other two partners lived, against them only, not showing that the resident had been sued. Judgment was taken against all these partners, and bill filed by two non-residents to enjoin it, because it was void. *Held*, that the writ was in substance a counterpart writ, though informal, and that the judgment was valid against all the partners. Cooper, J., dissenting.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

KEY & RICHMOND for complainants.

GEO. T. WHITE for defendant.

DEADERICK, C. J., delivered the opinion of the court.

The bill in this case was filed to enjoin two judgments of a justice of the peace of Hamilton county, rendered against them and one H. C. Hawkins, for \$81 and \$106. The warrant was issued to Hamilton county, against Howard W. Smith and said Hawkins, White and Depue, and one Butt, as partners. It appears to have been executed in Hamilton county on Hawkins only, the other defendants not being found, and the complainants being residents of Knox county.

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At the time of the issuance of the original warrant to Hamilton county, a counterpart, so-called, was issued in each case to be served on the complainants in Knox county. These last named warrants were not exact counterparts of the originals. They are issued only against White and Depue, the complainants, but bear the same dates as their originals, and recite the same causes of action, and summon the defendants to appear at the same times and places designated in the originals. And upon the face of each it is noted, that it is the counterpart of a warrant issued to Hamilton county.

The bill is filed alleging that the justice's judgments were void, and praying that they be perpetually enjoined. Upon demurrer, the bill was dismissed, and complainants have appealed to this court.

Literally, a counterpart is a duplicate or copy of the original summons or warrant; and in strictness it ought to be so made out by the clerk or justice, and the fact noted on the process, that it is a counterpart, and the names of the parties upon whom it is to be served also stated. Such, we think, is the usual and proper practice in such cases. It is the purpose of such process, like the original, to give the defendant notice that a suit has been commenced against him, and to notify him of the cause of action, and the time and place at which he was required to appear.

The facts in this case are such as authorize a justice to issue a counterpart, and the material and controlling question is, has this been done? The objection is that the counterpart does not show that the com-

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plainants were jointly sued with the other parties named in the original warrant. And in strictness this ought to have appeared. But the warrant executed upon complainants does show, upon its face, that it is a counterpart and not an original writ, and in legal effect declares that there are other parties sued upon original process, although their names are not disclosed.

We do not think, therefore, that the process served upon the complainants, or the judgment of the justice rendered against them, was void. In view of the liberal construction given to justices' proceedings, we are of opinion that the chancellor's decree dismissing complainants' bill was correct, and affirm it.

COOPER, J., delivered the following dissenting opinion:

The original summons in this case was issued by a justice of the peace of Hamilton county against several defendants residing in that county, and against two defendants who were resident citizens of Knox county. The justice issued what he intended as a counterpart writ for these latter defendants to Knox county, but he only included therein these two defendants. A counterpart writ is a copy of the original writ, and is authorized to be issued to another county when the court or justice has jurisdiction of the cause by reason of the fact that some of the defendants are residents of his county, or found therein. He has no jurisdiction of resident citizens of another county not found in his county. If, therefore, he issues a writ

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against the citizens of another county, the writ would be simply void. And the fact that he calls it a counterpart writ when it shows no other defendants' and consequently implies that the original writ is only against these same defendants, cannot give it vitality. The contrary ruling of a majority of the court necessarily enables any justice in any county of the State to issue a summons for non-resident citizens, and to send a counterpart of that writ to the county or counties where the defendants do actually reside, and thus acquire jurisdiction of a cause plainly not within his jurisdiction, unless the defendants go to his county and plead in abatement of the writ. I am unable to concur in a decision which leads to such a result. I think the process in question was not a counterpart of the original writ and was void, and that the justice had no authority to issue it. If it had been a counterpart of the original writ as it purported, it would have been equally void, as showing that the justice had no jurisdiction of the defendants. In either view, the writ was a nullity, and might be so treated by those upon whom it was served.

Judge McFARLAND being incompetent, did not sit in this cause.

Abel & Hodges v. Wilder.

ABEL & HODGES v. J. T. WILDER *et al.*

STATUTE OF FRAUDS. *Parole promise to pay debt of another.* A written promise to "arrange the debt," contained in a letter by a third party to a creditor who had recovered judgment, on which said third party was asking delay, is a valid promise to pay such debt, and will warrant judgment against him on delay granted.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

KEY & RICHMOND for complainants.

WHEELER & MARSHALL for defendants.

DEADERICK, C. J., delivered the opinion of the court.

Complainants are the assignees of a note given to Carvin for a tract of land by Hoskins. A bond for title to the land was given upon payment of the note to complainants. Judgment was rendered on this note in favor of complainants, on the 30th of October, 1875, by a justice of the peace, for \$408.06.

On the 19th of November, 1875, defendant Wilder wrote to Abel as follows: "I wish you to hold the execution against Hoskins on the Carvin title for some \$400, until I get back, and I will arrange it for you. J. T. Wilder."

No execution had in fact issued, but the sheriff

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had the claim for collection and handed to Abel this note from Wilder, whereupon Abel deposes "that he ceased all effort to collect the debt until Mr. Wilder told me he would not pay it, and then began this suit."

On the 17th of January, 1876, an execution was issued on this judgment and returned by the sheriff "15 Feb., 1876, for an alias." The alias issued the 22d of August, 1877, and was returned the same day *nulla bona*, and this bill was filed the same day, seeking to have the land sold for purchase money, and to hold Wilder liable for the debt. The bill makes Hoskins, Wilder and Carvin defendants.

Wilder admits the writing of the note, but insists it is not a promise to pay the debt, and that he expected to pay it out of funds to come into his hands belonging to Hoskins, but he never received said funds, and after a short absence from home, on his return he so told Abel. Certainly the writing is not literally a promise to pay the debt, but it is a request to Abel not to urge the collection of the claim, and a promise to arrange it, upon his return home. In consideration of this request, Abel took no steps for its collection, at a time when he could probably have made the money. He did wait until after Wilder's return upon his debtor, and upon this condition it was that Wilder agreed, in writing, to pay the debt.

The chancellor, however, gave complainant a decree for the sale of the land, but refused any relief against Wilder, and complainant appealed. This, we are of opinion, was erroneous.

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The language employed, that he would "arrange" the debt, we think fairly imports an agreement to pay it. The amount was ascertained by judgment, and it has been held, a promise to "settle," if made in reference to a liquidated amount, is equivalent to a promise to pay.

The chancellor's decree will, therefore, be so modified as to direct the proceeds of sale of land to be applied in the first instance as ordered by him, and if the sale shall not yield enough to pay charges upon it and the costs of this court and the court below, the chancellor will render a decree against defendant Wilder for the remainder of said judgment and costs which may not be satisfied by the sale of the land.

This cause will be remanded to the chancery court for the execution of the decree of this court.

JORDAN WILLIAMS *et al.* v. AMANDA M. BURG.

1. SUPREME COURT PRACTICE. *Special appeals.* It is error to grant a special appeal from a part of a decree declaring the rights of the parties and directing an account, and this court will either dismiss such an appeal or review the decree as upon a broad appeal, correcting errors in appellant's favor as well as against him.
2. COVENANTS. *Judicial sales.* A covenant of warranty runs with the land and inures to the purchaser at a judicial sale. One who buys

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the land at a sale in a vendor's suit, to enforce his lien, may sue the vendor for a subsequent eviction, which constitutes a breach of vendor's warranty to his vendee.

3. **SAME.** *Warranty. Ejectment. Notice.* When covenantee gives covenantor notice of the institution of suit for eviction, the judgment therein is conclusive upon the covenantor. Thus, where covenantee in an ejectment suit by an adverse claimant, defines the extent of his boundaries and defends under covenantor's deed, and judgment is rendered adjudging that land so claimed by the covenantee is included in covenantor's deed and that the adverse title is superior, such judgment is conclusive upon the covenantor and prevents him from alleging, in a suit upon the covenant, that such land was not included in his deed.
4. **SAME.** *Same. Form of notice.* No particular form of notice is necessary; if it explicitly and unequivocally notifies the covenantor of the institution of the suit and requests him to aid in making defense, it is sufficient.
5. **CHANCERY COURT JURISDICTION.** *Damages for breach of warranty.* Chancery Court has jurisdiction of purely legal demands in attachment cases, and since the act of '77, of suits to recover damages for breach of warranty.
6. **SAME.** *Same. Measure of damages. Costs, but not attorney's fee.* Taxed costs in successful ejectment suit by adverse claimant, are recoverable by covenantee in suit against covenantor for breach of warranty. Counsel fees are not taxed costs, nor regulated as to amount by law in this State, and sums paid therefor by covenantee for defense in ejectment by adverse claimant, are not recoverable from covenantor.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

GEO. T. WHITE for complainant.

M. H. CLIFT for defendant.

McFARLAND, J., delivered the opinion of the court.

This is an attachment bill, in which the principal ground for recovery is an alleged breach of a cove-

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nant of warranty in a deed made by the defendant conveying certain lands to the complainants and others.

The chancellor held that there had been a breach of the covenant to the extent of fifty acres of the land recovered by a paramount title, and that complainants were entitled to recover the purchase money paid, but refused to allow a recovery for the costs and expenses of defending the title, or counsel fees, and referred the cause to the master for an account upon the principles settled. Under sec. 3157 of the Code, the chancellor allowed an appeal to both parties before taking the account, upon their executing bonds. The complainants only complied with this condition, and the cause is here upon their appeal. We have denied the application of the defendants for a writ of error, upon the ground that the decree was not final.

The complainants appealed specially from that part of the decree denying their right to recover costs, counsel fees, and expenses incident to the suit in which the land was recovered from them, and it is now argued that only these questions can be considered by this court. While for the defendant it is argued that the court may examine the entire case, and counsel propose to show that there is no foundation for any decree against the defendant. This raises the question whether an appeal of this character should be allowed only from special matters complained of, without giving this court jurisdiction to examine the entire case. It was said in *Woods v. Cooper*, 2 Heis., 455, that it was competent for a party to appeal from that part of the decree only with which he is dissatisfied, but a

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broad appeal brings up the entire case, so as to allow relief to those who do not appeal. To some extent this latter clause of the statement has been modified in other cases, but the modification is not pertinent to the present case.

It is apparent, however, that to confine our consideration to the matters specially appealed from, might lead to inconvenient, not to say incongruous results, in a case like the present. Should we affirm this decree, or modify it in the respects complained of, without enquiring into other questions, and remand the cause for the account, we might, upon another appeal or writ of error by the defendant, be compelled to reverse the decree (which we now affirm) and dismiss the bill, or if not, change the entire principles of the recovery at the end of a tedious and expensive litigation.

It is apparent, therefore, that an appeal from a decree settling principles and ordering an account, ought to bring the entire case to this court, so that the principles settled by this court should not again be enquired into by either party; and we should, therefore, dismiss this special appeal as improperly granted, or treat it as bringing up the entire case. The latter we regard as at least the most convenient course for the parties, and will, therefore, examine the entire case. By this, however, we do not mean that in all cases we will look beyond the matters specially appealed from.

It is first maintained for the defendant that the complainants are not entitled to the benefit of the cov-

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enant sued upon. The deed containing the covenant was executed to five persons, conveying them the lands. The conveyance was subject to a lien for unpaid purchase money, and a bill was subsequently filed and the lien enforced by a sale of the land. Two of the purchasers had died, and at the sale the three survivors and a widow of one of the deceased parties became the purchasers, and the sale was confirmed and the title vested. The purchasers at this latter sale are the complainants.

It is argued, that as they acquired their present title at the judicial sale referred to, they are not entitled to the benefit of the covenant of warranty in defendant's deed, but the rule *caveat emptor* applies to them.

It is settled, however, that the covenant of warranty runs with the land, and whoever is the owner of the land at the time of the breach, can take advantage of it, whether he acquired title by voluntary or involuntary sale, as, for instance, a sheriff's or other judicial sale: See *Kenney v. Norton*, 10 Heis., 384; *Hopkins v. Lane*, 9 Yer., 78; *Rawle on Cov.*, 335; 4 Sneed, 54.

This is not inconsistent with the rule that *caveat emptor* applies to purchasers at judicial sales. This means that such purchasers have no warranty of title from the officer of the court making the sale, or the parties at whose instance it is made, but does not mean that they shall not have the benefit of such covenants running with the land as were made with the person whose title they purchase. This point, therefore, is not well taken.

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It is next argued that the demurrer should have been sustained upon the ground that the action sounds in damages, and is not such an action as the chancery court has jurisdiction of, even under our act of 1877. If this were true—which, however, it is not—still the chancery court has jurisdiction of even purely legal demands in attachment cases—the ground of attachment in this case being that the defendant is a *non-resident*.

The ground of defense, however, still more earnestly pressed is, that the land recovered from complainants by paramount title, is not embraced within the calls of defendant's deed, and she, therefore, did not warrant the title to it.

This raises the question in the first place, whether the defendant is bound, and if so, how far, by the judgment in the action by which the land was recovered from complainants. The action was brought by one Ritchie against one of the complainants. It is claimed that the defendant was duly and promptly notified and requested to take charge of the defense, or assist therein, but that she failed and refused to do so, and that the defense was properly and in good faith made by the complainants themselves.

We have held, upon full consideration, that upon proper and sufficient notice being given to the covenantor to appear and defend the latter in an action against him upon his covenant will be bound by the judgment establishing the paramount title, and no other proof of the paramount title will be required: *Greenlaw v. Williams*, 2 Lea, 533. The question of fact is then presented, whether the proper notice was given

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in this case. We are of opinion that the proof of the notice is sufficient. While it should be unequivocal and explicit, yet no particular form of words is necessary, and it need not be of record. "The only object of the notice," says Judge Freeman, "is that the party shall understand that a suit is pending asserting a superior title to the one warranted, * * and that he is called on to defend:" See above cited case. We think the proof shows that the defendant fully understood this in the present case.

The record in the ejectment suit, therefore, is conclusive as to the paramount title. In fact, however, this is not the controversy. The defendant insists that there was no conflict between the titles, and that the land recovered by Ritchie was outside of defendant's deed. The court, however, in determining the ejectment suit, found that there was a conflict between the titles to the extent of fifty acres, and that Ritchie's title was superior, and therefore gave the recovery.

The complainants, in their defense of the action of ejectment, in accordance with our statute, defined of record the extent of their possession and claim of title, and disclaimed title to the remainder of the land sued for. In defining their possession they set out the boundaries of the land embraced in the defendant's deed. The court found that the plaintiffs had superior title to part of the land sued for, that is, the land covered by two grants, known as the Kelly and McVey grants, and further found that the defendant in the action was setting up title to fifty acres of this land under the deed executed by the present de-

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fendant, as described in the plea of record, and, therefore, gave judgment that the plaintiff Ritchie recover of the defendant in the action, the fifty acres described, with costs, and found the defendant not guilty as to the remainder of the land sued for. So it will be seen that the court did adjudge the very point now in controversy, that is to say, that the fifty acres for which the recovery was given, was within the claim of the defendant in the action, which, as we have seen, was confined to the land conveyed by defendant's deed, and consequently establishes that the defendant did warrant the title to the fifty acres, otherwise the judgment must have been for the defendant.

Is the defendant in the present case also bound by this part of the adjudication? We see no ground of distinction as to the effect of the judgment. The covenantor had notice that the defendant was relying alone upon the title conveyed by him, and he was expected to maintain the title and show the correct boundaries of his deed. The theory upon which the judgment is held conclusive upon him is, that he is in effect a party to the suit. By failing to do what his covenant requires him to do—that is, to defend the title—he becomes bound by the conduct of the case by his covenantee, if the defense be properly made, and in good faith.

If, however, we were to go into the question of fact, the result would be the same. The defendant's deed embraced several tracts, among others, one known as the Geo. W. Williams grant, No. 17525. The question was, whether there was a conflict between the

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boundaries of this grant and the boundaries of the two grants of Ritchie. This question depended upon the manner of running the lines of the Williams grant, and we are not prepared to say that the survey adopted by the circuit court in the ejectment suit was not correct.

Another ground of defense urged in argument is, that part of the fifty acres recovered by Ritchie was in his actual adverse possession at the time defendant's deed was executed, and that, therefore, the deed to this extent was, under our champerty laws, void for all purposes, and no action can be maintained upon the covenant of warranty.

It is, perhaps, a sufficient answer to this argument to say, that the question is not made in the pleadings. The answer sets up no such defense, and that the defendant cannot prove a defense not set up in his answer. If the question were properly presented, it would seem to be in some doubt under our authorities.

The case of *Williams v. Hogan*, Meigs, 149, was an action upon a covenant of warranty; the declaration showing that the land was adversely held when the deed was executed. It was held that a demurrer upon this ground should be sustained; that the deed was void for all purposes, and no action could be maintained upon the covenant. In the subsequent case of *Ruffin v. Johnson*, 5 Heis., 604, it appeared that the complainant had secured his creditors by a deed of trust upon certain lands. The bill was filed to enjoin a sale by the trustee, upon the ground that as the lands were adversely held, the deed was void for cham-

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perty. The court held that the complainant was estopped from setting up this defense by his bill. And in other cases it has been said that although such deeds are ineffectual to convey the title so as to enable the purchaser to recover in ejectment, yet a recovery may be had in the name of the vendor, which will enure to the benefit of the purchaser—the conveyance being good between them by way of estoppel.

However the rule may be at law, the true rule in equity should be, that if the land adversely held was really sold and taken into the account in estimating the price, the vendor ought not to be allowed to retain that part of the purchase price. If he be not liable upon the covenant of his deed, he should be compelled to restore the purchase money *pro tanto*, upon the ground that the sale was to that extent void. If, on the other hand, the purchaser knew at the time that the land was adversely held, and that too by a paramount title, and this part of the land was not really intended to be sold or estimated in fixing the price, then the vendor ought not in equity to be liable upon his covenant or otherwise. But, as indicated, there is no issue upon these questions in the pleadings, and we can make no adjudication in regard to them.

This brings us to the errors assigned by complainants. First, that they were not allowed to recover the taxed costs in the ejectment suit as part of the damages. We are not aware that this question has been passed upon in this State. The authorities seem to sustain the claim. See them collated in Rawle on

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Cov., 304; Sedgewick on Meas. Dam., p. 315, *et seq.* And in principle it seems to us that the claim should be sustained. The theory upon which the covenantor is held bound by the judgment in favor of a party setting up a paramount title, of the bringing of whose suit he has had notice, is, that he thereby becomes a privy in interest and in effect a party to the action. If he fails to defend and his covenantee makes the defense properly, it would seem to follow logically that if the covenantor is bound to make good the recovery, that the costs are as much a part of the recovery as the land itself. The only way the covenantee could avoid the costs, would be to surrender the possession to the claimant of the paramount title without suit; but if he do this, it is at his peril, and it would be unreasonable to require him to do so. We are of opinion that the taxed costs incurred in a proper defense should constitute part of the damages.

Upon the question of counsel fees, the authorities, according to Messrs. Sedgewick and Rawle, in their respective works upon the subject where they are cited, are shown to be in conflict, and we have no reported decision upon the question in this State.

If the employment of counsel be necessary, upon principle it is not easy to see why the expense is not as much a legitimate part of the damage sustained as the costs of the cause. The common law doctrine, that the services of a counsellor are honorary and gratuitous, does not prevail in this State: *Newman v. Washington*, M. & Yer., 79. Yet if such expense is put upon the same ground as the costs, the plaintiff

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would in every case recover his necessary counsel fees incurred in protecting a rightful claim against a defendant, precisely as he recovers his costs. There would be some justice in the claim, and in some States and in the Federal courts a tax fee is in some instances allowed. But such fees have never been allowed in the courts of this State. It is within the recollection of some members of the court that we have decided against the claim in a case precisely of this character. We have certainly so decided in analogous cases, and the chancellor's decree on this point will be affirmed. Nor do we think the complainants entitled to recover the other expenses claimed.

The chancellor properly refused relief as to the further payment claimed to have been made upon the original purchase money, as this was precluded by the decree, which was submitted to.

The decree will be modified as indicated, and the cause remanded. The costs of this court will be paid, two-thirds by defendant and one-third by complainants.

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NEEF & WHIGHAM v. CHATTANOOGA GAS LIGHT CO.

SUPREME COURT PRACTICE. *Depositions. Bill of exceptions.* Depositions taken before a clerk on a reference by the judge of a law court in a lawsuit before him, and made the basis of the clerk's report, are ~~not~~ part of the record of the suit, unless made so by bill of exceptions.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. D. C. TREWHITT, J.

TOMLINSON FORT for Neef & Whigham.

A. J. CALDWELL for Gas Company.

DEADERICK, C. J., delivered the opinion of the court.

A motion is made by defendant to rescind the order entered upon a former day of this term, upon a suggestion of diminution of the record, made by plaintiffs, awarding a *certiorari* for a more perfect transcript of the proceedings in the court below. The order as entered reserves the question of costs, and also the fact as to whether any diminution is shown to exist.

The suit was begun and determined in the circuit court of Hamilton, by plaintiffs, to recover for work and labor done for defendants. It was tried by his

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Honor, the circuit judge, who ordered an account to be taken by the clerk and a commissioner, showing the state of accounts between the parties. Upon report being made, exceptions were taken on both sides, and judgment rendered by the court. From this judgment the plaintiffs have appealed to this court.

The court was authorized to appoint the clerk or a commissioner to state the account between the parties, to aid him in the right determination of the case. And although this practice is like that pursued in chancery, a cause pending in a law court, legal in its character, as contradistinguished from equitable, does not thereby, in a court of law, become subject to the rules of chancery practice.

The diminution insisted on, consists in the failure of the clerk to transcribe and send up with the record, the depositions upon which he founded his report, and upon which the court acted. But there is no bill of exceptions making these depositions part of the record, and they are not part of the record unless made so by bill of exceptions.

The mere reference of the clerk to the deposition of A or B, as sustaining the fact or charge reported by him, does not make the depositions part of the record, or authorize him to transcribe them as part of the record.

Nor does the fact that a judge, in law cases, decides the questions of law and fact therein, as in chancery, make the case one falling within the rules of chancery practice and procedure. He determines facts, under the same rules as those applied by this court in cases

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of facts found by a jury. If they are sufficiently sustained by the evidence, his finding is conclusive. If wholly unsupported by evidence, his finding will be set aside. If he is sustained by the evidence in his finding upon the facts, but is in error in his conclusions of law, his judgment would be reversed. So in cases where a jury is dispensed with, the judge exercises its functions, as well as those pertaining to him as judge.

This is a law case, tried under rules applying to cases at law, and the evidence, whether it be oral or in depositions, can only be made a part of the record by bill of exceptions.

There not having been any bill of exceptions in this case, the order heretofore entered awarding *certiorari* will be vacated and the writ refused. The costs incident to the motion will be paid by plaintiffs.

NASHVILLE & CHATTANOOGA RAILROAD COMPANY v.
JOHN T. SMITH, Adm'r, etc.

RAILROADS. *Personal injuries causing death. Contributory negligence. Damages. Charge of court.* In an action against a railroad company for personal injuries causing death, upon declaration containing two counts, one for failure to observe statutory precautions, and the other for common law negligence, the proof showed that plaintiff's intestate was standing upon a platform about thirty-eight inches high and about two feet from the track at a station which was not a regular stopping point; when the train was about one hundred yards distant, she got down from the platform and began to walk upon the ends of the cross-ties, between the platform and the rails; being warned by a by-stander of her danger, she said, "I think I can make it," but turned and beckoned to her child not to follow her; she was caught by the train before reaching the end of the platform and killed. The engineer testified he did not see her.

1. The circuit judge, at the request of plaintiff's counsel, charged: "If plaintiff's intestate got herself without negligence into a position of danger, she is not to be held responsible for contributory negligence for an honest though erroneous exercise of judgment in getting out." *Held*, this was misleading and erroneous; if the appearances were such as to put a reasonable person in apprehension of danger, and she disregarded them and her death resulted in consequence, this was such contributory negligence as bars a recovery at common law, and mitigates damages under a count for failure to observe statutory precautions.

2. Defendant's counsel asked the court to charge, "It is the duty of an intelligent being to exercise reasonable precaution to avoid danger, and this precaution must be exercised in proportion to the danger and the knowledge of the danger." To which the court replied: "That applies to the common law count, but not to the count for statutory negligence." *Held*, this was error; the instruction requested applies to both counts, the difference being that deceased's violation of this rule would bar the remedy at common law and mitigated the damages under the statute.

3. The court instructed the jury that they might consider as an element of damage, the loss by deceased's children of the society and

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protection of their mother. *Held*, this was error; this is an action under Code, sec. 2291, and in such case plaintiff can recover only such damage as deceased could claim had she lived.

FROM MARION.

Appeal in error from the Circuit Court of Marion county. D. C. TREWHITT, J.

KEY & RICHMOND for Railroad.

W. E. DONALDSON and N. BURT for Smith.

McFARLAND, J., delivered the opinion of the court.

This action was brought by the administrator of Merzy Nunnelly, deceased, for the use of her surviving husband and next of kin, to recover of the railroad damages for injuries causing her death. There was verdict and judgment for the plaintiff for \$3,500, from which the defendant has appealed in error.

There is no material conflict in the evidence as set out in the bill of exceptions. The deceased was killed by a passenger train on defendant's road, at a station called "Vulcan." At about 2 o'clock in the afternoon, she had been engaged in getting some articles out of a box she had on the platform, when the train came in sight, running on regular schedule time from Chattanooga to Nashville. Vulcan was not a stopping place for that train, and in passing its speed was about twenty miles per hour. After getting the articles, deceased started with them along the side of the track and between the rails and the platform, walking part

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of the time on the ends of the cross-ties. She was going in the direction of the coming train, and in full view of it. According to some of the witnesses, it was not more than one hundred yards distant when she started—according to others, something further. The platform was thirty-eight or thirty-nine inches high, and the space between the platform and the cars when on the track is said by the witnesses to be from one to two and a half feet. There was another way or path leading from the point where the deceased started to the house of her daughter, where she was then living, but a steeper, rougher way than the route taken by her. After she started, she was spoken to by a bystander and told that she had better get off the track or the train would kill her; this witness says he again said to her, "Don't you see that train coming, it will kill you;" she replied that "it would not," or that she could get off; or, according to another witness, "she guessed she could make it." At any rate she kept on, although she motioned to a little grand son who was following her, to go back. This witness says when the train was within twenty feet of her, he "hallooed" to her again. When near the end of the platform she stopped and leaned up against it, in which position she was struck and killed.

There is proof that she could have gotten off the track and out of the way after she was spoken to, or even at the last moment, by stooping under the platform. Her conduct was so unaccountable as to induce the belief upon the part of some that her death was intentional. The engineer says he did not see

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ber, and did not know that any one had been killed until he reached Tullahoma, a considerable distance away.

There are two counts in the declaration. The first charging a failure to observe the statutory precautions against accidents; the second charging common law negligence.

Among other things, the judge used the following language in his charge: "If plaintiff's intestate got herself without negligence into a position of danger, she is not to be held responsible for contributory negligence for an honest though erroneous exercise of judgment in getting out there. Instructions are applicable to both counts."

This, as we understand it, means that if she honestly thought she could pass safely between the platform and the train, or get out of the way before the train reached that point, that this was but an error of judgment and not negligence. This was misleading and erroneous. If the danger was patent to a person of ordinary intelligence, and deceased possessed ordinary intelligence and was in the possession of her natural faculties, and voluntarily placed herself in such position of danger, especially after she was directly cautioned against it, then she was guilty of negligence. No matter if she did honestly think she would escape unhurt, it was nevertheless negligence to take the risk.

Again, the judge was requested to say to the jury "that it is the duty of an intelligent being to exercise reasonable precautions to avoid danger, and this precaution must be exercised in proportion to the danger

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and the knowledge of the danger," to which he responded, "Such is the law applicable to the second count, but not to the first count."

The proposition was applicable to both counts; the difference being, however, that contributory negligence does not defeat the action under the first count, but only mitigates the damages, whereas, under the second count it might defeat the action altogether. The question of contributory negligence was, however, pertinent under either enquiry.

The charge is also erroneous in instructing the jury that in estimating damages, they might take into consideration the loss of social relation of husband and wife, parent and child, etc., and the advice and protection of the deceased as wife and mother.

There are expressions in some of our opinions justifying this charge, to some extent at least. But this is the statutory action given by sec. 2291, *et seq.*, of the Code, and is the same action, whether it be brought by the injured party in person or by his administrator after his death: *Railroad v. Fowler*, 9 Heis., 829.

Hence the damages to be recovered are those sustained by the injured party—the action is not for wrongs to the husband or next of kin. The damages are such as the injured party could have recovered, if instead of being killed she had been disabled for life, if not the same amount, at least for the same elements of damages.

Judgment reversed, and new trial awarded.

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THE CHICAGO & ALTON RAILROAD CO. v. D. A. WALKER.

RAILROADS. *Foreign corporation. Suit against agent.* The C. & A R. R. Co. having no office nor any part of its line in this State, employed B as its agent in this State to induce travelers to take such routes as connected with their line. B had no authority to sell tickets for his principal, and his business, which consisted principally in securing emigrants as patrons for his company, required that he should travel from place to place, see passengers, aid them in purchasing tickets, and checking baggage on connecting lines, and correspond with persons likely to travel over his principal's line. His presence was frequently required at C., in this State, that place being a railroad centre of lines connecting with his principal's, but he had no office or place of business there. W. sued the Company for breach of a contract made with B, serving process on B, whose want of authority to receive the service of process was raised by plea in abatement. *Held* that the service was invalid and the plea good.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. D. C. TREWHITT, J.

KEY & RICHMOND for Railroad.

VANDYKE, COOKE & VANDYKE for Walker.

McFARLAND, J., delivered the opinion of the court.

This action was begun by Walker in the circuit court of Hamilton county. The sheriff returned the process "executed by serving the within on Charles F

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Ludlum, principal agent of the defendant in Hamilton county." The defendant pleaded in abatement that it was a foreign corporation, created under the laws of Illinois; that its line of road is in the States of Illinois and Missouri, and its principal office in the city of Chicago in the former State; that Charles F. Ludlum was never appointed agent of defendant in Hamilton county, Tennessee, and had no authority to accept service of process for defendant, and defendant had no office or agency in Hamilton county, Tennessee, at the time plaintiff's cause of action accrued or since."

The plaintiff filed a replication, which was accepted by the court below as a sufficient traverse of this plea. Upon this issue the case was tried, resulting in a judgment for the plaintiff.

There is no very material conflict in the proof. The Chicago & Alton Railroad Company has no road or general office in this State; a part of its line extends from St. Louis to Kansas City and constitutes a link in one of the competing lines to California and the West. Ludlum was, in the language of the general passenger and ticket agent, "the Southern passenger agent of said company for all the territory south of the Ohio river and also the States of Virginia, Arkansas and Texas." For part of the time his "head quarters" were at Chattanooga, and afterwards at Nashville—the change taking place, according to witnesses, about February, 1880. He had, however, no fixed residence or place of business. His business was to solicit travel over his line of road, that is, to solicit travelers to take a route that would lead over

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his road. He sold no tickets, and was not authorized to sell tickets. His course of business was, when he found a passenger willing to take his route, to conduct him to the ticket agent of the connecting road at the point, who would sell him a ticket over the various roads. He would also assist the passenger in checking his baggage, and give him information, etc. He distributed advertisements or "folders," as they are termed, representing the superior advantages of his line. One of these exhibited in proof has the name of Ludlum thus: "Charles F. Ludlum, southern passenger agent, under the Read House, Chattanooga." In point of fact, however, he kept no office or place of business. He "hunted up" the passengers and emigrants about the depots, car sheds, or wherever he could find them. By "head quarters," the witnesses say, is only meant the place where he received his mail; and after he had changed his "head quarters" from Chattanooga to Nashville, he continued to carry on his business at Chattanooga "about as before."

His business required him to travel over any portion of the States or territory mentioned, where he could find passengers or emigrants. Chattanooga was a good point, as several roads centered there, and he was often at that point, but was confined to no particular place.

On the 24th of April, 1880, Ludlum induced the plaintiff, who was going to California, to take his route, and conducted him to the ticket office of the Nashville, Chattanooga & St. Louis Railroad at Chatta-

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nooga, where the agent of the company sold plaintiff a through ticket to San Francisco.

The ground of the action is, that Ludlum promised plaintiff that in passing over the road of the Chicago and Alton company from St. Louis to Kansas City in the night, he should have a car with reclining seats, equal to a sleeping car, and that this agreement was grossly violated by the conductor when the plaintiff reached that part of the route.

The question was, whether upon these facts service upon Ludlum was sufficient to give the court jurisdiction of the defendant. The action is transitory, and such actions, unless otherwise expressly provided, may be brought wherever the defendant is found. A corporation is in general supposed to be located at its principal office, but it may be that a corporation can be said to be situated, for the purpose of being sued, wherever it has an established place of business, even without special legislation upon the subject.

With respect to foreign corporations, it is sometimes provided as a condition of their being allowed to do business in this State, that they shall keep agents here, authorized to acknowledge service of process: Code, sec. 1500. But where this is not in terms provided, there is no doubt that foreign corporations may be held subject to the general provisions of our statutes with respect to service of process on corporations, and it is perfectly legitimate to construe these provisions as applicable to foreign as well as domestic corporations, where the language employed will allow this construction. Foreign corporations doing

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business in this State, with a knowledge of these provisions, cannot complain that they are made to apply to them.

It only remains to examine the provisions of our statutes upon the subject. Code, sec. 2831, is in these words: "Service of process on the president or other head of a corporation, or in his absence on the cashier, treasurer or secretary, or in his absence, on any director of such corporation, will be sufficient." This section, it will be readily seen, does not meet the present case. The next is: "If neither president, cashier, treasurer or secretary resides within the State, service upon the chief agent of the corporation *residing* at the time in the county where the action is brought, shall be deemed sufficient." Sec. 2832.

The next section relates to actions brought in the county where the principal office of the corporation is located, and is, therefore, not applicable.

Section 2834 is as follows: "When a corporation, company or individual has an office or agency in any county other than that in which the principal resides, the service of process may be on any agent or clerk employed therein, in all actions growing out of, or connected with the business of the office or agency."

This is substantially the same as sec. 2811. Secs. 2831, 2832, 2833 and 2834, are amended by the act of 1859-60. Section 2834a, is in this language: "That hereafter, when a corporate company or individual has an *officer* (evidently meaning an *office*) or agency or resident director, in any county other than that in

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which the chief officer or principal resides, the service of process may be made on any agent or clerk employed therein, in all actions brought against said company, growing out of the business of, or connected with said company or principal business."

These various sections comprise all our legislation upon the subject. They appear to have been intended more directly to indicate the county in which actions shall be brought against domestic corporations, but are comprehensive enough to apply to foreign corporations. The sections which appear to be more directly applicable, are: First, section 2832, which, as we have seen, applies to cases where neither the president, cashier, treasurer or secretary resides in the State, in which case service may be had upon the chief agent *residing* at the time in the county where the action is brought. We have seen, however, that the proof all agrees that Ludlum was not at any time *residing* in Hamilton county. He only stopped there temporarily, as his business required. He was a traveling agent, and was no more a resident of Hamilton county than of the various other points where he did business. It can hardly be said that he was at the same time a resident of all these various points, or that his residence changed as often as he moved from one point to another; and this would logically follow from holding that he was, in the sense of this statute, an agent *residing* in Hamilton county. We predicate nothing upon the proof that before the service of process he had changed his "head quarters" to Nashville, but for

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the argument concede that he was as much a resident of Hamilton county after that as before.

The other sections to be considered, are sections 2811 and 2834, as amended by sec. 2834 *a*. Sections 2811 and 2834, before the amendment, provided that where an office or agency was kept in any county other than the principal office, service of process might be had upon any agent or clerk employed therein, in all actions growing out of the business of the office or agency. We held in *Toppins v. Railroad*, 5 Lea, 600, that by the amending section, 2834 *a*, the service in such cases was good, without regard to whether it related to the business of that office or agency or not.

The question then remains, whether "the office or agency in a county," in the meaning of these sections, were intended to apply to such an agency or office as the proof shows that Ludlum conducted in Hamilton county. We think not. If this were a suit against a domestic corporation in a county other than the one of its principal office, we think it could not be held that the office or agency in Hamilton county, as shown by the proof, was such as to authorize the suit to be brought in that county and service to be had upon such agent. The office or agency in such cases would be held to mean, some office, agency or place of business *located* in the county. And if we apply the section to a foreign corporation, we cannot give it a broader construction.

It will be observed that the sections we are considering, apply not only to corporations, but to com-

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panies and individuals. It could not have been intended to authorize suits here against non-resident firms or individuals by service upon their traveling agents. It was only intended to allow such suits where such non-resident firms or individuals have an office or agency for the transaction of business *located* in some county in this State.

As we have seen, the defendant had no office or agency in Hamilton county, any more than upon same proof might be held to apply to any other point in the southern States, where Ludlum might happen to "drum for passengers." We think this is not the meaning of these provisions. The charge of the circuit judge is not very definite in its meaning, but it authorized the jury to construe the law differently, which they did.

The judgment is reversed.

DEADERICK, C. J. and TURNEY, J. dissenting.

Spears v. Smith.

A. L. SPEARS, Guardian v. GEO. F. SMITH *et al.*

PLEADINGS AND PRACTICE. *Liability of justices of county court. Negligence.*

Loss. To sustain an action against justices of the county court for accepting a guardian's bond with only one surety instead of requiring two or more sureties as prescribed by statute, there must be proof of actual loss by reason of the act or omission, otherwise the recovery would only be for nominal damages.

FROM MARION.

Appeal from the Chancery Court at Jasper. W.
W. BRADFORD, Ch.

SPEARS & SPEARS for complainant.

F. V. BROWN for defendant.

COOPER, J., delivered the opinion of the court.

Bill filed October 8, 1875, by complainant Spears, as guardian of Emma L. Havner, an infant, against G. F. Smith, the former guardian, and Wm. O. Patton, the only surety on the guardian bond, for an account of the guardianship, and against E. D. Tate, B. Laster and H. L. Bible as members of the county court who approved Smith's bond as guardian, to hold them liable for the failure to require two or more sureties as required by statute. The chancellor, on final hearing, rendered a decree against Smith and Patton for the amount found due from the guardian to his

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ward, and dismissed the bill as to the other defendants, charging them, however, with the costs of their branch of the case. The complainant appealed from so much of the decree as dismissed his bill against the justices of the county court.

On February 9, 1864, O. Havner died intestate, leaving a widow and ten children, among whom were Nancy B. Havner and the complainant Emma. In June, 1865, M. B. Havner, one of the intestate's sons, was appointed and qualified as administrator of his father's estate. In his settlements with the county court, the last of which was made March 1, 1869, he claimed and obtained credit for \$128 paid to the guardian of complainant as her share of her father's personal estate. On the day of the last settlement, the former guardian having resigned, G. F. Smith was appointed guardian of complainant and her sister Nancy B., and qualified by giving bond, with Patton as surety, in the penalty of \$700, conditioned "to well and truly as such guardian perform all the duties which may be required by law." The defendants Tate, Laster and Bible constituted the quorum court who took and approved the bond.

In the meantime, on July 11, 1867, M. B. Havner, with other adult heirs of the intestate, filed a bill for the partition of the lands of the estate, and obtained a decree ordering the partition, and appointing commissioners for the purpose. The commissioners made a partition of the lands, and reported the result to the court. On February 19, 1870, Smith, on behalf of his wards, filed a bill in the nature of a cross-bill

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in the partition suit, attacking the settlement of the administrator, and asking that the lands be sold for division, upon the ground that they were not susceptible of equal partition. Such proceedings were had in the cause that the lands were sold, and the proceeds divided among the heirs. Between June 14, 1872, and April 2, 1875, Smith, as guardian, received of these proceeds as the share of his ward, the complainant, \$605.42. He had previously received from the former guardian \$128, her share of the personalty. He was removed from the guardianship in October, 1875.

It will be seen from the foregoing statement of facts that at the time of the execution and acceptance of the bond of the defendant Smith as guardian, on March 1, 1869, the estate of the ward consisted of \$128, her share of her father's personalty, and an undivided interest in her father's realty, which had been ordered to be partitioned. The penalty of the bond was sufficient to secure the personal estate of the ward, and leave a small margin for the rents of the realty, if any. The record does not show that the lands, although valuable, yielded rent, and the penalty of the bond was, therefore, sufficient for the protection of the ward's estate. The justices of the county court could not be required to know that the lands, which at the time of the appointment of the guardian were ordered to be partitioned, would subsequently be sold for division under the proceedings commenced nearly a year thereafter. The only fault which can be imputed to the justices was in accepting a bond from the guardian with only one surety.

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The requirement of a statute that two or more sureties shall be taken upon a bond is, as a general rule, merely directory, and a bond with one surety would be good. The officer accepting it could not be proceeded against as if he had failed to take any bond: *Johnson v. Williams*, 2 Tenn., 178; *Foster v. Blount*, 1 Tenn., 343. But it is altogether another question whether the officer would not be liable to the party aggrieved for the damages sustained if in fact a loss occurred by reason of the failure to require the number of sureties fixed by the statute. It would be a plain violation of duty not to comply with the direction of the statute which is positive in its terms.

Previous to the Code, the act of 1762, ch. 5, sec. 5, made the justices of the county court appointing the guardian liable for all loss or damage sustained by the ward by reason of their committing his estate to a guardian without taking good and sufficient security in the first instance. The act was not very effective for the purpose intended: *Strong v. Harris*, 3 Hum., 451. Its provisions were not brought forward into the Code. The duties prescribed by the Code in relation to the taking of the bonds of guardians are, however, ministerial, not judicial, and for their violation an action on the case may be maintained by the party injured. To maintain such an action the conduct of the justices must be alleged to have been willful and malicious, and the averment must be supported by proof of conduct from which malice or corrupt motive may be implied: *Boyd v. Ferris*, 10 Hum., 406.

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The complainant alleges in his bill, "on information and belief," that at the time his bond as guardian was executed, Smith was insolvent, and that his surety, Patton, was insolvent "or not of sufficient property to secure the amount of the bond." It is further alleged that the defendants, Tate, Lasater and Bible, in taking the bond acted willfully and maliciously, or in a manner from which the law implies malice. These allegations are all expressly denied in the answers of the defendants, and there is no proof to sustain them. The bond was no doubt taken by the justices, as all of them say in their answers and one of them testifies, in ignorance of the requirement of the statute in relation to the number of sureties. The question is, therefore, narrowed down to the point whether malice can be inferred from the mere failure of the justices to require more than one surety. The answer is, perhaps, not difficult, but it is unnecessary to make it. For, the surety taken being at the time good for the penalty of the bond, and, so far as appears, continuing solvent to the present time, and there being no proof of actual loss or damage, all that the complainant could in any event recover would be nominal damages, which might carry the costs. But the chancellor taxed these defendants with the costs of their part of the case, and the complainant has had all the recovery he was entitled to.

The decree of the chancellor will be affirmed, and the complainant will pay the costs of this court, the costs below to be paid as adjudged by the chancellor.

Mabry & Wife v. Churchwell.

JOSEPH A. MABRY AND WIFE v. SOPHIA M. CHURCH-
WELL, *et al.*

CHANCERY PLEADINGS AND PRACTICE. *Opening biddings. Notes date from sale.* Ordinarily, and in the absence of any controlling equity, upon the opening of the biddings of a judicial sale, the purchaser should be required to execute his notes for the purchase money as of the date of the public sale the biddings at which are opened, and upon the terms of the decree of sale.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W.
B. STALEY, Ch.

W. P. WASHBURN for complainants.

W. M. BAXTER and HENDERSON & JOUROLMON for
defendants.

COOPER, J., delivered the opinion of the court.

Lands having been sold under the orders of the court in this case, a party offers to advance the biddings over ten per cent. on each sale. The sales were on time, and the question submitted to the court is whether the notes to be executed by the party making the advance should be dated back as of the date of the original sale.

Under the practice of the courts in this State, judicial sales are usually ordered to be made at public vendue, upon notice of the time and place, the highest

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and best bidder being required to comply with the terms of sale by making the cash payment if any, and executing his notes with personal security for the deferred payments. The master makes a report to the court of what he has done, showing that the money and notes are in his hands. The biddings are subject to be opened by an advanced bid of ten per cent. or more: *Click v. Burris*, 6 Heis., 539. The person offering the advance is required to secure to the satisfaction of the court the amount offered, and this for the obvious reason that otherwise an actual purchaser, whose bid is secured, might be lost for a mere promise: *Childress v. Harrison*, 1 Baxt., 415; *Glenn v. Glenn*, 7 Heis., 369. The amount may be secured either by the applicant complying with the terms of his offer by accompanying the application with the necessary money and notes, or by entering into a written obligation with good security to comply with the terms of his offer if so ordered by the court: *Allen v. East*, 4 Baxt., 308; *Mound City Mutual Life Ins. Co. v. Hamilton*, 3 Tenn. Ch., 228; *Atkinson v. Murfree*, 1 *Id.*, 51.

By the English practice, the master was authorized to receive bids, and the biddings were usually conducted in the master's office. To open the biddings for a given time was merely to extend his authority until the expiration of that time. The opening of the biddings under that practice left the date of the sale open to the agreement of the contracting parties. Under our practice, the public sale fixes a date from which the purchaser and the creditor, or other party

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entitled to the proceeds of sale, acquire rights if the sale be confirmed. To open biddings in such a case is simply to allow other persons the opportunity, *nunc pro tunc*, to become purchasers precisely as if they had made their bid at the original sale. It would be manifestly unjust to the persons entitled to the proceeds of sale to extend the time of the deferred payments during the delay of confirmation either of the original sale, or of the re-sale, and no such extension should be permitted except where the same is demandable as of right upon some legal or equitable ground. It is a concession to the owner of the property and the person offering the advance to open the bids at all, and as the latter may regulate his offer by the rule of practice, it is clear that no right of his is affected by a course which justice to the creditor, or other recipient of the fund, imperatively demands in the absence of an adverse controlling equity. Besides, an advance of *ten per cent.* on the original bid is sufficient to open the biddings. If now the offer is exactly *ten per cent.*, and the re-sale is made to date from the time the opened biddings are closed, the actual advance will be diminished below *ten per cent.* by the interest which will be lost by the extension of time, and the advance would vary in each particular case. Undoubtedly the court may, upon a proper case shown, set aside the first sale altogether, and order a re-sale from the date of which the rights of the parties will accrue: *Reese v. Copeland*, 6 Lea, 190. But ordinarily, and in the absence of any controlling equity, upon the opening of biddings for the usual period al-

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lowed, the purchaser should be required to execute his notes as of the date of the public sale the biddings at which are opened, and upon the terms of the decree of sale. Ordered accordingly in this case.

HICKS *et al.* v. JOHN FREDERICKS.

EJECTMENT. *Limitation. Adverse possession. Pleadings and practice.* To countervail superior paper title, the adverse possession must have been actual by fences, enclosures or buildings, where the land is capable of such possession, and where it is not, such fact must be averred in pleading. Such acts as cutting timber, grazing cattle, erecting hog-pens, are illusory and insufficient.

FROM MARION,

Appeal from the Chancery Court at Jasper.
W. M. BRADFORD, Ch.

FOSTER V. BROWN for complainant.

W. D. SPEARS for defendant.

FREEMAN, J., delivered the opinion of the court.

This is a bill by the heirs of Stephen Hicks, for recovery of upwards of twelve hundred acres of mountain land, to which respondent sets up claim as owner.

It is conceded that complainant's title papers give

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the superior right, which is sought to be obviated by respondent, claiming under a younger grant, by adverse possession for sufficient length of time to perfect his title under the statute of limitations.

The statement on which this defense is made is as follows: That "he has owned the land for almost, if not quite twenty years, and has a grant for the same." He then, in denial of the charge of the bill that he had never had possession of the land, says: "Respondent is now, and has been for the last fifteen or sixteen years, in actual adverse possession of said land, using it for the purpose of grazing and for timber, and for the last five or six years he has had a house on the same, and enclosures kept up continually, claiming all the time in his own right, by virtue of his grant."

This statement of the facts relied on as constituting his possession means, when fairly construed, that the respondent had grazed his cattle on the land, had used timber on it, but had no actual occupation of it, until the last five or six years, when he had built a house on it, enclosed a part of it and kept up the enclosures, claiming under his grant.

By this statement of facts he is bound. We might dispose of the case here, for conceding this entire statement to be true, it does not constitute such a state of facts as would give the protection of the statute.

The general rule, as stated by McFarland, J., in *Pullen v. Hopkins*, 1 Lea, 744, is that "actual possession for seven years is necessary to give the younger

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grantee the better title under our act of 1819, and actual possession is generally understood to mean an enclosure by buildings, fences, or other similar improvements." The respondent not only shows that he has not had such possession, but that in his judgment the land is capable of and fitted for actual possession in the way indicated, by the fact that he has within the last five or six years before this litigation, so actually occupied it. In order to make the facts stated a defense at all, he should have stated that the land was not of such a character as to admit of any more permanent occupation, and this was the only use for which it was properly adapted. He rebuts this view by his own statement.

On looking to the testimony, the respondent fails entirely to make out such state of facts as would give him the benefit of the statute, even if he had set them up sufficiently in his answer. The nearest to an occupation of the land shown is, that he built a hog-pen, four square as it is termed, that is, of the width each way of the rails—say ten feet—and at some time had fed his hogs in the pen. This, we need not say, would not be such an open and notorious possession or of such a character as to meet the demands of the statute. Such an occupation would, on such a tract of land, not be a real *bona fide* possession, notifying the owner of an adverse claim and occupancy. This is too clear for argument.

The result is, the chancellor's decree is reversed, and a decree will be rendered in favor of complainants with costs.

Deakins v. Alley.

S. B. DEAKINS v. W. T. ALLEY, Ex'r, *et al.*

SALES OF LAND. *In gross or per acre. Parol evidence. Pleadings and practice.* Where it is uncertain from the face of the deed or bond, whether the sale was in gross or per acre, parol evidence is admissible to show the intention of the parties; and where it appears from the face of the deed or bond that the sale was in gross, it may be shown to have been a sale per acre, upon allegation and proof that the deed or bond was so drawn through fraud or mistake.

FROM MARION.

Appeal from the Chancery Court at Jasper. W. M. BRADFORD, Ch.

W. D. SPEARS for complainant.

F. V. BROWN for defendants.

FREEMAN, J., delivered the opinion of the court.

The leading questions in this case are, whether a tract of land sold by the Bennetts to complainant was sold in gross or by the acre, and the acreage misrepresented by vendor.

The complainant charges that he bought the land in 1875, took a title bond for the same, at \$33.50 per acre; that the vendor represented to him at the time, that there was one hundred and ninety-one acres in the land covered or included by the title bond; that the land had been recently surveyed by the county surveyor, and according to that survey there was not the

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number of acres stated. It is further charged that complainant had confidence in the statement thus made, and relied upon it wholly as to the number of acres in the tract.

In support of this view, it is further stated, that when they met to execute the title bond, and complainant gave his notes for the purchase money, the amount of the notes was ascertained, by estimating the land at one hundred and ninety-one acres, and the price at \$33.50 per acre.

If complainant has established these charges he is entitled to a decree for the alleged deficiency in the tract. If not, he fails. The tract is shown by actual survey to contain only one hundred and sixty-six acres and a fraction, making a deficiency of about twenty-five acres, and at the price stated, of over eight hundred dollars—the whole price of the land being, as charged, \$6,400, for which six notes were given—all of which have been paid, we believe, but the last two.

Respondents, after insisting that the face of the title bond conclusively shows that the sale was in gross, and a gross sum agreed to be paid for the land specified in the boundaries set out, deny specifically each and every charge of the bill, except a qualified admission that the calculations, as charged, were made at the time of giving the notes, but say (if any were made) they were made merely out of curiosity as to the price paid per acre by complainant. In support of these denials it is added, that complainant thoroughly knew the land and its boundaries, had repeat-

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edly gone over it, and was as competent to estimate the acreage as the vendor. It is also suggested, that if the sale had been by the acre, the number of acres could as readily have been ascertained then as five years after, when the bill was filed.

The first question to be settled is, whether the title bond or the original memorandum, by their terms show the sale to have been in gross, that is, a sale of the tract of land included in the boundaries given, and whether, under the facts in this case, parol proof can be looked to, to show the sale to have been made by the acre.

The language of the bond is: "I have this day bargained and sold to the said Deakins, for the consideration of \$6,400, the following described tract of land,"—giving the boundaries specifically. After this it is recited that Deakins had executed his six promissory notes, each for \$1,080, except the first, which is \$1,000, and then the usual condition to make title to the land described on payment of the purchase money. The memorandum of the contract substantially agrees with the bond.

In the case of *Barnes v. Gregory*, 1 Head, 234, the contract, which was a deed, described the land, and added, it "contained thirty acres more or less," and the consideration was stated to be a gross sum of \$1,050. It was contended, on a bill to allow for a deficiency, that the deed was alone to be looked to as containing the contract of the parties, and parol testimony could not be heard to change it.

The general rule was stated to be undoubtedly cor-

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rect, but it was distinctly held that on a bill charging fraud or mistake in the quantity of the land, the written contract might be contradicted by parol, and the deficiency was allowed to be shown notwithstanding the statement in the deed that there was "thirty acres in the tract more or less"

The court say: "The deed is silent as to the disputed questions, whether the sale was by the acre or in gross, and that parol evidence was admissible to show how the fact was"—adding: "Such is the uniform course of decision where there is a substantial deficiency, and the contract by the acre; or even in gross, where there is fraud or imposition," citing *Bently v. Miller*, 5 Sneed, 671. These cases were followed by this court in the case of *Witherspoon et al. v. Porter et al.*, Legal Rep., vol. 1, pp. 51-2. Here the title bond is entirely silent as to whether the contract was by the acre or in gross—the amount of the consideration alone being given, but whether arrived at by assuming or ascertaining the number of acres, and finding the sum at the agreed price, is not stated.

The bill goes on the idea that there was a representation made by Bennett as to the number of acres, that is, that there was one hundred and ninety-one acres, and this representation relied on by the vender, and that this was untrue. Such a representation, relied on by the other party, which turns out to be untrue, and producing loss, has all the elements essential to legal fraud or mistake, especially when taken in connection with the fact that the failure in quantity amounts to about one-seventh of the value of the land.

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On looking to the testimony in the record, we think the clear preponderance is in favor of the theory of complainant's bill.

The complainant swears most definitely to the facts as charged. The defendant, as is usual in such cases, as definitely the other way, and insists that the land was simply sold for \$6,400, in gross, without regard to acreage.

It appears, however, that the trade was made some weeks before the execution of the title bond, and a memorandum of the contract drawn up at the time—the title bond drawn afterwards in pursuance of this contract. This contract was witnessed at request of the parties. This witness swears as his best recollection that a calculation was made in his presence for the price of the land, at about \$33.33 or \$33.50 per acre. When the title bond was drawn, another calculation was made, and Mr. Spears, the attorney, swears that his recollection is that about \$33.50 per acre was the amount spoken of, though he does not recollect to have heard the number of acres stated. The parties seem to have been business men, and competent to make their own calculations, and no doubt did so. Other witnesses give conversations with Bennett, in which the price of the land is spoken of as having been as stated, \$33.50 per acre.

This, in connection with the cautious, but fairly implied admission in the answer, with the unsatisfactory explanation given of it, "that if calculations were made it was only out of curiosity to see how much the \$6,400 would be per acre, gives an unquestioned

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preponderance in favor of complainant's view of the transaction. The calculation could not have been made without assuming as a basis for it the number of acres, as understood between the parties, and this understanding most naturally came from the representation of the vendor. The land having been recently before this surveyed in a body, and three small tracts sold off, each of which had been surveyed, and the amount known, furnished the basis on which such a statement might well have been made.

In addition, there are other considerations that tend strongly to support this view. The land was, part of it, perhaps forty or fifty acres, within the corporation of the town of Jasper. Portions of the tract had been laid off into town lots, and is shown to have been favorably located for such use. The vendee was purchasing with a view of utilizing a portion if not all in this way. It would be a most unbusiness-like proceeding, had he bought such a tract of land, guessing at the quantity, under such circumstances, and especially when it appears that it was deemed by his friends somewhat doubtful whether he would not be pressed to pay for it; and probably, if not certainly, he relied on sale of part for town lots as the means of enabling him to do so. Business men do not purchase land in and near towns with such views, without knowing how many acres they are purchasing; nor do such men usually sell, without having a definite idea of the acres sold. We may add, in corroboration of this view, the fact that the other three small tracts sold off the land by the vendor, lying further from

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town we believe, show the habit of business of the vendor, and seem to have been sold by the acre, and regularly surveyed to ascertain the number of acres in each.

The result is, the chancellor's decree must be reversed, and a decree entered here in accord with this opinion and with the terms of the agreement in the record, against the lands attached. Respondent Bennett will pay the costs of this court. Costs of court below to be paid out of the fund arising from the sale.

SATIRA POSEY *et al.* v. E. G. EATON *et al.*

SALES, JUDICIAL. *Collateral attack. Administrator. Incompetency of judge who rendered the decree. Service of process.* Upon a bill filed by heirs to avoid a sale of ancestor's land under an administrator's bill to pay debts, it was held:

1. Where the decree, under which the sale was made, recites that the personal estate had been exhausted, such finding is conclusive upon a collateral attack, and will not be reviewed upon bill filed to avoid the sale.
2. The fact that the administrator was improperly appointed, another administrator of the same estate having been appointed by another court of this State, will not be inquired into, when the appointment is valid upon its face, the administrative action of the county court is conclusive upon collateral attack.

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3. That the judge, who, without objection, rendered the decree under which the sale was made, was of kin or counsel to parties, will not avoid the sale; his incompetency is waived, if unexcepted to at the time.
4. Where the original process has been lost or destroyed, and the decree and rule docket recite due service thereof upon the heirs, their uncorroborated denials of service, however positive, direct and confident, will not avoid the sale.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

BURTON & SON and L. B. HEADRICK for complainants.

KEY & RICHMOND and TOMLINSON FORT for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed to remove a cloud from the title of complainants, to certain lands in Hamilton county. These lands belonged, in his life time, to John Brown, Jr., who died in 1863, in the city of Nashville, but was in fact a resident of Hamilton county, Tennessee, at his death.

It appears that William Clift claimed to be a creditor by judgment against John J. Brown, administrator of Jno. Brown, Jr., deceased, and filed his bill in 1868, against the administrator and heirs of Brown, to sell lands descended to the heirs for the payment of his own and other debts.

The papers filed in said cause are shown to be lost

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or destroyed, so that we have only the decrees and orders made in the minutes of the court, showing the action of the court in the case, and the entries on the rule docket, to guide us as to their contents, except the secondary proof found in the record, given by counsel who had examined said papers before they were lost, in preparing the answers of their clients in this case.

Said proceedings are claimed by the present bill to be void, and prayed to be so declared.

The facts charged on which this decree is asked, as found in the bill, are as follows:

That Clift and Abell were not creditors, and had no subsisting debts against the estate. That more than two and six years had elapsed after the appointment of one Ragan, in Davidson county, administrator of the estate of Brown, and these parties had not brought suit against him, and the claims were therefore barred by limitation; and because said administrator was not a party to the suit, nor any account of the personal estate that had come into his hands taken; and because there was sufficient personal estate left by deceased to pay all just debts.

We need but say, that none of these matters can be inquired into in a collateral proceeding as this is, unless it be possibly the failure to make the administrator a party, the decrees of this court being regular on their face, and showing the existence of the debts, the exhaustion and insufficiency of the personalty, and consequent necessity of the sale of the land with reasonable certainty. The objections referred to might

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avail as error on a direct proceeding by appeal or writ of error, to reverse the decrees made, but cannot be looked to in a proceeding like the present, as repeatedly adjudged by this court.

Other objections are made in the pleadings, some of them, of a more serious character, which we proceed to notice:

It is alleged that the proceedings are void, because Judge Trewhitt was second cousin of the Browns, and made an order in the case directing an answer to be filed, and Judge Key is alleged and shown to have made an order appointing a *guardian ad litem* for one or more of the minors, and is said to have been incompetent to have done so, because he had been a counsel for parties in the cause.

These objections have no validity as we have held, in such a case, overruling such opinions, as seemed to hold the contrary. If the parties submit to the action of the judge at the time, the incompetency is considered waived, and not available on a collateral attack on the judgment. This question and the cases will be found reviewed in the case of *Holmes v. Eason*, at Jackson, April Term, 1882, in an opinion of Judge Cooper, in which the cases in 6 and 8 Baxt., 72 and 353, are overruled, and the principle of the case of *Crozier v. Goodwin & McConnell*, 1 Lea, 125, affirmed.

It may well be doubted whether the question of the representative character of John J. Brown, as administrator of Jno. Brown, Jr., deceased, as urged in the argument by the learned counsel, is made in the

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pleadings before us. We think it certain it was not intended to be made by the pleader who drew the bill, and it is evident he meant only to allege the fact that he was not a party, so that an account could be had of the personalty in his hands, and the correctness of his administration looked into on an account, as the matter of complaint in this bill. No charge is made that Brown, who was appointed by the county court of Hamilton county, the residence of the intestate, was not the legal administrator, and properly the then representative of the estate. We need not definitely decide the question argued. We only say, that on the facts shown, we do not see how it can be maintained that his appointment is a nullity.

The case of *Johnson v. Gaines*, 1 Cold., 288, giving the same conclusive effect to the proceedings of the county court in matters of probate and administration as to the proceedings of other superior courts, and that if the judgment is valid on its face, it must stand until revoked by direct proceedings for that purpose, would seem to be as conclusive in this case in favor of the action of the county court of Hamilton, as any other decree; and while it stands, would conclusively show in all collateral proceedings, that the said Brown was administrator. It might be the court ought not to have granted the letters, while Ragan's administration in Davidson county was unrevoked, but this was but an error in the judgment at most. The county court of Hamilton was the proper court having jurisdiction to appoint the administrator, it being the county of the residence of the intestate; and this

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court would be slow to hold a jurisdiction legally conferred was void, because another court had wrongfully, without any legal authority, exercised the jurisdiction. Be this as it may, the question is not so made in the bill as to require its definite settlement in this case.

We but add, that if Brown is to be recognized as an administrator by reason of his appointment by the county court of Hamilton—and no allegation is made in the bill controverting this—then it could not be urged in this proceeding, that the sale was invalid, because no special account was had of a former administration. The decree reciting the fact of exhaustion of assets, it would be presumed all proper sources of inquiry had been resorted to in ascertaining this fact by the court, and we could not correct his decree in a court of coordinate jurisdiction, or in the same court, by showing the conclusion was not warranted by the facts. This would be to review the action of the chancellor, and reverse it in his own court, by another bill.

The main question relied on to sustain the decree of the chancellor is, that the defendants to that bill were never regularly made parties—were not served with process. The principle is beyond question, that if the parties were not before the court, the decree would be void.

We have the recitals of the decree or decrees of the court, stating the fact that all were before the court, either by service of process on them personally or by publication. We have the next best evidence,

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if not conclusive evidence of the fact, in the entries regularly made at the time on the rule docket, a docket required to be kept by law, and to show the fact of the return made on the process by the officer to whom issued. From this it appears the sheriff or his deputy returned the *subpoena* executed on all the parties within a very short time after its issuance. The *subpoena* itself being lost, this as secondary evidence is the next best evidence that could be resorted to for the ascertainment of what the action of the officer was. It is an official act, done in the regular performance of his legal duties, and therefore has a presumption of a very high character in its favor. These things, in connection with the parol proof in the record, make it satisfactory, that the officer under his oath returned the process executed on all the parties, except the non-resident, and the rule docket shows publication as to this party.

In reply to all this, we have only the depositions of the parties themselves, that they were not served, and that about twelve years after the time of the transaction. In the case of *Tatum v. Curtis*, 9 Baxt., 361, it was held by this court, that it would not do to set aside the judgments of courts and the official acts of officers, upon the simple denial of service by the party himself, unsupported. We find no real or substantial support for these parties in this record, and think the weight of all the evidence decidedly preponderates against what they have said.

This disposes of all the questions raised by the pleadings as grounds for attacking the validity of the

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sale. Other questions have been argued, which are not raised by allegation, and need not be decided. The question of appointment of guardian *ad litem* for the minors, without giving their names, is one question so argued. We need but say, that while this has been said to render an appointment void in the case reported in 1 Heis., 730, citing 1 Swan, 484, this was an inadvertent remark of the learned judge, the facts not raising the question in the 1 Heiskell case, as there was no evidence of service of process at all, and the same may be said of the case in Swan.

The result is, that there is no sufficient ground on which to declare the proceedings in the chancery sale void—and the decree of the court below will be reversed, and the bill dismissed with costs of this and the court below.

THOMAS RIDGE v. THE SCOTTISH COMMERCIAL INSURANCE COMPANY.

INSURANCE. *Forfeiture. Vacancy.* The insured cannot recover upon a policy of insurance which provides that should the premises become vacant, the policy should be forfeited, where the loss occurred while the premises were temporarily vacant.

FROM KNOX.

Appeal from the Chancery Court at Knoxville.
W. B. STALEY, Ch.

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HENDERSON & JOUROLMAN for complainant.

T. S. WEBB for defendant.

McFARLAND, J., delivered the opinion of the court.

This bill was brought to recover upon a fire policy. Among other conditions is the following:

"If the within mentioned premises shall * * * become vacaut or unoccupied, * * * without the assent of the company endorsed hereon, * * * then, and in every such case, this policy shall be void."

The policy was effected the 15th of August, 1879, for three years. The house is described as complainant's "one-story and a half brick, shingle roofed building, occupied as a dwelling," etc. The bill charges that it was burned on the 14th of October, of the same year, and that the company has interposed only one objection to the payment of the loss, and that is, "that the house was vacant at the time it was burned."

"The facts with regard to that," says the bill, are as follows: "Said building was at the time it was insured, leased by complainant to a tenant then in possession. At the time of its loss as aforesaid, complainant was absent in Europe on a visit. He left said building in the charge of a capable, prompt, energetic and entirely trustworthy agent, with instructions and full power to keep a tenant in it. Complainant is informed and believes and so avers, that some few days, perhaps four or five days before the day on which said house was burnt as aforesaid, complainant's tenant left said premises and the same became tempo-

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arily vacant. But complainant's said agent immediately went into possession and closed said building, and proceeded to procure a good and proper tenant therefor, who was to have, and would have moved into said building on the day after it was burned, and complainant avers that said building was not necessarily vacant, nor was it unoccupied for an unreasonable length of time, nor was it thus vacant through any default or neglect of his, or his said agent."

The bill contains the further allegation that the local agent of the company was familiar with the property and the purposes for which it was used, and knew that in all probability it would necessarily become temporarily vacant by the ordinary changing of tenants, and that it was not contemplated by the parties that the policy should become void in such contingency.

The question whether upon these allegations the company is liable, according to conditions of the policy as above set forth, was properly raised by demurrer and decided in favor of the complainant, but by leave of the chancellor an appeal was prosecuted from his decree.

Counsel for the company have referred us to several cases, holding in accord with their views that in such cases the insurer is not liable, but frankly conceded that authorities may be found upon either side of the question.

It is but a question as to the true interpretation of the contract. Insurance policies are usually accompanied with a great number of conditions and stipu-

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lations limiting and restricting the liability. Some of these, at least, are but reasonable, in view of the frauds and impositions to which insurers are subject. It must be confessed, that in many instances, the courts have displayed great ingenuity in explaining away these conditions and holding the insurers liable notwithstanding. These decisions have generally been met by additional restrictions and new conditions and stipulations, and so far it is not easy to see which side has the better of the contest. Where the contract has been fairly entered into it should be fairly construed, and its true import and meaning ascertained without any straining of the language or violent presumptions on either side, and the contract as thus construed should be enforced. It is in accordance with our sense of justice that insurers should be held to the full measure of the liability assumed, but no less so that they shall have the protection of the conditions which the parties have stipulated as parts of the contract.

The argument for the complainant is, that although the house was in fact vacant and unoccupied at the time it was burned, yet it was not the character of vacancy contemplated by the contract. That it being known that the house was leased or rented to tenants, it must necessarily have been contemplated that an occasional change of tenants would probably occur during the three years the policy was to run, and it would be unreasonable to suppose that it was contemplated that the vacancy necessarily occurring upon one tenant moving out and another moving in, should render the policy void, or that the assent of the company should

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be obtained to such change of tenants in order to keep the policy alive, and although in this instance the vacancy continued four or five days, yet upon the facts stated, it was no more than the necessary and reasonable vacancy occurring upon a change of tenants, and was therefore not the character of vacancy which, in the meaning of the contract, was to avoid the policy.

Although the language is, that "the policy shall be void" in the event the premises shall become vacant or unoccupied without the assent of the company endorsed on the policy, yet the true meaning doubtless is, that the policy shall be void or inoperative *during the vacancy*, and so it is in terms expressed in some policies. This would be a reasonable stipulation upon the assumption that in the view of the contracting parties, the risk is greater during the time the premises are vacant than when they are occupied, and the parties might reasonably assume that such difference as to the risk really exists. But a stipulation that a temporary vacancy should render the policy void for the entire balance of the period covered by it, notwithstanding the premises be again occupied as before, would be clearly without reason, and hence it should not be so construed.

But the question remains whether in the meaning of this contract the company is liable for a loss that occurred during a time when the premises were vacant?

As intimated, the parties regarded the risk as greater during a vacancy of the premises, and not without

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reason, as when the premises are occupied, it is not so much exposed to incendiaries, and the beginning of a fire would be more promptly discovered and extinguished, and hence without any additional permission or without notice, or the assent of the company, they were unwilling to assume the risk during the vacancy, and so the contract stipulates. Now the question is, whether notwithstanding this stipulation the company will, nevertheless, be liable for a loss occurring during a vacancy, provided the vacancy be of short duration, or in the language of the bill, a necessary and not unreasonable vacancy, occurring by a tenant unexpectedly moving out and the difficulty of procuring another to take his place at once. If the risk be greater during a vacancy, then the length of the vacancy is immaterial as to the degree of the risk; it is only material as to the continuance of the risk. A house vacant for five days is during the period as completely vacant as it would be if so continued for six months. The increased risk is the same in either case, the difference being only in the period of its continuance.

Furthermore, how are the courts to determine what would be reasonable vacancy? What period of time shall they fix? If the policy covers a loss occurring during a vacancy continuing *five* days, why not ten or twenty? The same misfortune of the owner might prevent him from getting a tenant for even a longer period. The owner, however, having failed to stipulate for such contingencies, and procure a policy without limit in this respect, and having failed to procure the assent of the company, it simply results that during

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the period of vacancy he is without insurance, and carries the risk himself.

In support of this view, we refer especially to *Alston v. Insurance Company*, by Supreme Court of North Carolina (1879), 8 Reporter, 246, and *McClure v. Insurance Company*, by Supreme Court of Pennsylvania (1879), 8 Rep., 694.

The case most strongly relied upon by complainant's counsel, is *Poss v. Insurance Company*, decided by this court at the last term at this place and reported in 7 Lea, 704. The policy in that case was upon a boiler, engine, machinery and tools, etc., in a chair and furniture factory. It provided that it should become void "if the premises should become unoccupied and so remained for more than thirty days, without the assent of the company endorsed on the policy, * * * or if it be a manufactory and it shall cease to be operated without special agreement endorsed on the policy."

The question was whether a temporary suspension of the manufactory for eleven days before the fire, caused by a yellow fever epidemic, rendering it impossible to procure hands, avoided the policy, under the latter part of the clause. It was held that it did not. The argument of the opinion is, that to adhere literally to the language of the contract the policy would become void if the machinery stopped, as Sunday, or to clean out the boiler or make necessary repairs, which would be unreasonable if not absurd; hence it could not mean such a temporary stoppage, and a temporary suspension from the impossibility to procure

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hands was placed upon the same grounds, and it was held that the "ceasing to operate" meant a permanent and not a temporary suspension. At first view there seems to be a strong analogy between that case and the present, but on closer consideration the cases will be found different. In the *Poss* case it will be observed that an additional and almost conclusive consideration in favor of the decision, is that the same clause of the policy contains a condition with respect to buildings, that if they become unoccupied *and so remain for more than thirty days*, the policy shall become void. So it is manifest that it could not have been intended that mere temporary stoppage of the machinery in the building for a less period of time, which does not imply an entire vacancy or abandonment of the building, but which, on the contrary, might well occur when all proper watches and safeguards against fire were observed—should have the effect to render the policy void. As this would be in effect to hold that entire abandonment of the building would not avoid the policy thereon, unless it is continued for more than thirty days; whereas, a temporary stoppage of the machinery for a shorter period would avoid the policy thereon although the building remained unoccupied. But if we apply the rule established in that case to the present, we can only do so by holding that a vacancy to avoid the policy must be permanent and not temporary. This does not seem justifiable upon the language used giving it its natural import and meaning, and it is besides probably opposed to the weight of authority. When would

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a dwelling house be considered *permanently* vacant? How long would it have to remain?

A manufactory may cease to be operated with a purpose at the time not to resume, this would be a permanent "ceasing to operate." But a vacancy of a tenement house occupied by a tenant moving out, is not with a purpose that it shall remain permanently vacant. Whether it is to be permanently vacant would depend upon the result, that is, whether a tenant could be procured, and this probably could not be determined until the policy would run out, besides, it has already been said a temporary vacancy is the same as a permanent vacancy, except as to its duration.

It seems to us that by the plain letter of the contract the policy was not in full force when the fire occurred, according to the allegations of the bill. The decree must therefore be reversed, the demurrer sustained and the bill dismissed with costs.

TURNEY, J., dissenting.

Bolin v. The State.

ED. BOLIN v. THE STATE.

CRIMINAL LAW. *Evidence. Dying declarations.* The State proved, without objection, that the deceased being in *extremis* and in apprehension of death, stated that the prisoner had mortally wounded her with an axe; the defence afterwards introduced evidence tending to prove the insanity of the declarant; the trial judge charged the jury, that the sanity of the declarant was a question of fact for them to determine; it was insisted upon appeal that the judge should himself have determined the question of the sanity of the declarant. *Held*, that the defendant should have objected to the admission of the declaration, if he desired to raise the sanity of the declarant as a preliminary question; that the judge could not be put in error for admitting evidence, unobjected to at the time and competent in the shape presented, by other evidence subsequently introduced; and though it would have been his duty to withdraw the declarations from the jury if he had been convinced of the declarant's insanity, yet his action in not withdrawing the declarations implies that he thought the declarant sane, and, if erroneous, defendant could not complain, since the judge gave the jury the power to find this question, which he had thus impliedly determined against the prisoner, in the prisoner's favor.

FROM HANCOCK.

Appeal in error from the Circuit Court of Hancock county. N. HACKER, J.

KYLE & McDERMOTT for Bolin.

ATTORNEY-GENERAL LEA for the State.

TURNER, J., delivered the opinion of the court.

The prisoner was indicted in the circuit court of Hancock county for the murder of his wife, Mary Bolin. Was convicted of murder in the second de-

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gree; sentenced to ten year's imprisonment in the penitentiary, and now appeals to this court.

The assignment of error is, upon evidence that on the day previous to her death the deceased said: "Them licks that Bolin gave her was killing her, and she was nearly gone; he killed her with an axe." "That she could not live till morning."

There was evidence introduced tending to impeach, as well as sustain the sanity of the deceased. No objection was made to the admissibility of the testimony.

In his instructions to the jury the court said: "I have permitted the dying declarations of the deceased to go before you," etc., * * * * It is insisted that the deceased was not of sound mind, and that on that account her dying declarations should be disregarded. The law presumes every person to be of sound mind until the contrary is shown. If you shall be satisfied from the evidence that the deceased, at the time of making the dying declarations, was of such unsound mind as not to be able to know and understand what she was saying, and to properly understand the nature, import and character of what she was saying, then the dying declarations should be disregarded by the jury. But if you are satisfied that at the time of making the dying declarations, she properly understood what she was saying, etc., you will give such weight," etc.

It is now argued this was error, that it was the duty of the trial judge, without the aid of the jury, to determine the competency of the evidence on the proof as to the state of the declarant's mind.

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We are referred to *Smith v. The State*, 9 Hum., 10, and *Brakefield v. State*, 1 Sneed, 214. In the first, Judge Turley says: "Testimony of this character is only admitted from necessity, and an abuse of it is guarded against by the law with the most minute particularity."

There is no one principle better established than that such declarations shall not be received unless the proof clearly shows that the deceased was *in extremis*, and that he or she at the time of making them, was fully conscious of that fact, not as a thing of surmise and conjecture, or apprehension, but as a fixed and inevitable fact. And of this the judge is to determine alone, without the aid of the jury, for the jury shall not have such declarations till the judge has determined that they are dying declarations, lest peradventure they may control their judgment, etc.

The second case refers to and approves *Smith's* case. As presented by the transcript before us, the testimony of dying declarations was given before a question of sanity was made. The court had no notice of the purpose of the defense to make the question. So under such facts, the rule in all respects having been complied with, it was the duty of the court to admit the evidence of the declarations. A court cannot be put in error for admitting testimony clearly competent in the shape in which it is presented, because it may afterwards turn out that the defendant had in his keeping evidence which might change the opinion of the court, but which he withheld until a later stage in the course of the trial.

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If under the latter state of circumstances, the evidence had been shown to be incompetent, it would have been the duty of the court to have withdrawn it from the jury and warned it against giving it any weight in its deliberations. We must presume the court did its duty in leaving the testimony with the jury. We think the deceased was of sufficient mind to understand her language and appreciate her condition.

If it was error in the court to submit the question of sanity to the jury (a question we do not decide), it is one of which the prisoner cannot complain, as the court put it in the power of the jury to disregard his holding against the prisoner and determine the question of sanity for itself.

Upon the facts of the case we are satisfied the jury meant to be as lenient as its conscience would at all allow. Affirmed.

Taylor v. Deakins.

R. B. TAYLOR v. S. B. DEAKINS *et al.*

VENDOR AND VENDEE. *Unregistered deed. Creditors of vendor. Liability of vendee.* The vendor of land assigned the purchase notes to a third party in consideration of a pre-existing debt. The vendee paid a part of the purchase money note to assignee and promised to pay balance. The vendee failed to register his deed which had been probated, and creditors of the vendor levied executions upon the land after the assignment of the notes. The vendor became insolvent after the assignment of the notes. Vendee filed bill to be relieved of payment of the notes, because the land had been appropriated to debts of the vendor, and assignee filed cross-bill to enforce vendor's lien. *Held*, assignee had no lien after levy of executions upon the land, and that the vendee would not be relieved from payment of the notes, because there were no *existing* equities at time of assignment, and the vendee's negligence in failing to have his deed registered barred the assertion of right to be relieved.

FROM MARION.

Appeal from the Chancery Court at Jasper.
W. M. BRADFORD, Ch.

F. V. BROWN for complainant.

W. D. SPEARS for defendant.

McFARLAND, J., delivered the opinion of the court.

On the 23d of November, 1875, the complainant purchased of S. B. Deakins three lots of land in the town of Jasper, Deakins executing and delivering to him a bond for title, which was on the 26th of the same month acknowledged for registration, but was

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not in fact registered or filed for registration until the 13th of February, 1879.

Several notes were executed by complainant to Deakins for the purchase price, among others, one falling due the 1st of January, 1879, and one falling due the 1st of January, 1880, each for the sum of \$325. These notes being for the last two payments.

Before the maturity of these notes, to-wit, about September, 1877, they were by Deakins transferred to "Fishel & Bros.," in satisfaction of certain notes and an account which they held against Deakins. The complainant had notice of the transfer, at what precise time, however, is not certain, from the proof, but at any rate, on the 14th of January, 1879, he remitted by express \$275, which was on the 24th received by Fishel & Bros., and credited on the first mentioned of said notes. Complainant also promised to pay the balance soon. Shortly afterwards, to-wit, on the 5th of February, 1879, several executions were issued and levied upon the lots in question, founded upon judgments rendered by justices of the peace of Marion county, against said Deakins, in favor of Hicks, Houston & Co., and other defendants in this cause. These judgments were rendered, except perhaps one, in the months of March and May, 1878. It will be observed that the levy of these executions were before the registration of complainant's title bond. The judgment creditors were proceeding to have condemnation of the lots in their several cases. When on the 22d of February, 1879, the original bill was filed by Taylor to have relief against the notes in the hands of

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Fishel & Bros., upon the ground that they were not purchasers of the notes for value in the due course of trade, and that the levy of the executions created an equity against their payment. Fishel & Bros. filed their answer as a cross-bill, in which they insist that as the holders of the notes they have a vendor's lien on the lots superior to the lien of the execution creditors.

1st. The claim of Fishel & Bros., under their cross-bill, cannot be allowed. The execution creditors, by virtue of the levy of their executions before the registration of the complainant's title bond, and before steps taken by Fishel & Bros. acquired a valid lien, upon the simple ground that until registration, or notice for registration, the sale as to them was void. The lien attached from the date of the levy of their executions, and not from the filing of the justices' papers in the circuit court. This lien, it is true, may be lost by laches or failure to proceed in time, but there is nothing of the sort shown in this case, as this bill was filed soon after the levy of the executions.

2d. Does the levy of these executions and the creation of these liens constitute an equity upon which the complainant, Taylor, can be released from his personal liability to pay Fishel & Bros. the notes held by them, upon the facts of this case? We answer no, without determining whether Fishel & Bros. were strictly innocent purchasers in the due course of trade, so as to be protected against existing equities; it is sufficient to say that they became the absolute owners of the notes, and complainant had notice of the fact

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at a time when he concedes that there was no ground of defense or equity against their payment.

The subsequent lien or encumbrance created upon the property by the creditors of Deakins, was caused by the negligence of the complainant in failing to have his title bond registered, as he in his deposition concedes. There is proof that at the time Fishel & Bros. accepted the notes from Deakins in satisfaction of their debts on him, that he was then solvent, and they might then have made their debts out of him, but that before the filing of this bill he became insolvent.

It is true, the general rule is that the assignee of negotiable paper for a pre-existing debt, is not a holder in the due course of trade without notice, and hence with respect to *existing equities* he stands in the shoes of the assignor, but the assignee does not continue to stand simply in the shoes of the assignor, especially after notice, so that his right to enforce the payment of the debt may be defeated by the subsequent acts of the assignor or debtor.

While it would no doubt be a good defense against the payment of these notes in the hands of Deakins, to show that the property had been taken by his creditors, even though this resulted from complainant's negligence, yet upon the facts of this case we think it is otherwise as to Fishel & Bros. The complainant has no equity as against them.

The chancellor's decree was in accordance with this holding, and it will be affirmed with costs.

Parkes v. Clift.

JAMES A. PARKES v. W. CLIFT *et al.*

1. **ESTOPPEL.** *Judgment.* The estoppel of a judgment or decree extends to all matters material to the decision of the cause which the parties, exercising reasonable diligence, might have brought forward at the time.
2. **RES ADJUDICATA.** *Judgment.* A judgment or decree to be a bar as *res adjudicata* must be in the merits, but to this end it is not necessary that the litigation should be determined on the merits in the moral or abstract sense of these words; it is sufficient that the *status* of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases.
3. **SAME.** *Demurrer.* A decree dismissing a bill upon demurrer, on the ground of lapse of time or laches, is on the merits, and a bar to another suit between the same parties or their privies, about the same subject-matter, and for the same purpose.
4. **LIMITATIONS OF ACTIONS.** *Code 2755 construed.* The Code, sec. 2755, which authorizes a plaintiff to commence a new action within one year after the rendition, in a suit commenced by him within the time limited by the statute of limitations, of a judgment or decree against him "upon any ground not concluding his right of action," does not apply when the judgment or decree is on the merits.
5. **LIMITATIONS.** *Statute of.* In a suit by heirs to recover lands descended from an ancestor, and for this purpose to set aside a judgment against the ancestor, as void for want of notice or fraud, and a sale of the lands made under the judgment during the life of the ancestor, the time of limitations or laches would begin to run against the ancestor.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

BARTON & SON and L. D. HEADRICK for complainant.

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RICHMOND & KEY and M. H. CLIFT for defendants.

COOPER, J., delivered the opinion of the court.

On May 15, 1854, Robert Lusk recovered a judgment in the circuit court of Davidson county, against Thomas Parkes for \$1720. The entry shows that the judgment was by default upon an acknowledgment of service of the summons, and that the acknowledgment was proved by R. C. Foster, Esq. On the 1st of July, 1854, a *fi. fa.* issued on this judgment to Davidson county, and was returned "no property found." On September 12, 1854, an *alias fi. fa.* issued to Hamilton county, and was levied by the sheriff on several thousand acres of land as the property of Parkes. On January 10, 1855, the sheriff, by virtue of the levy, sold the land to the judgment creditor, Robert Lusk, for less than the amount of the judgment, and made him deeds accordingly, which were duly registered. In the month of October, 1855, Thomas Parkes died intestate in Hardin county, leaving three children as his only heirs, W. J. Parkes, then about seventeen years of age, Thomas Parkes, about fifteen years of age, and the complainant, James A. Parkes, then twelve or eighteen months old. The deceased left also a widow. Administration was taken out on his estate shortly after his death.

On April 25, 1876, W. J. Parkes, Thomas Parkes and James A. Parkes, filed their bill in the chancery court of Hamilton county, as the children and heirs of Thomas Parkes, the intestate, against Wm. Clift, of Hamilton county, Matilda Lusk, as executrix of the last will of Robert Lusk, deceased, and E. G. Pearl,

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individually and as executor of the last will of Dyer Pearl, deceased, setting up title to the lands sold by the sheriff as aforesaid, and seeking to remove as clouds upon their title, the conveyances under which the defendants claim. The complainants say that they were ignorant their father owned these lands until 1876, when Thomas Parkes, while investigating the title of certain lands in Hamilton county, which had descended to them from an uncle, unexpectedly found the sheriff's deed. It was further found that on April 11, 1865, Robert Lusk and the defendant, E. G. Pearl, in his own right and as executor of the last will of Dyer Pearl, his deceased father, each as the owner of an undivided moiety of the lands in controversy, joined in conveying to the defendant Clift an undivided fourth of said lands, and to R. C. McRee, another fourth, and that on March 27, 1873, McRee sold and conveyed to defendant Clift his interest in the lands. The bill set out the facts as to the judgment, execution, levy and sale, and sought to have the same declared void. The defendants demurred to the bill, and the demurrer, although overruled by the chancellor, was, upon appeal, sustained by this court at the September term, 1879, and the bill dismissed.

On March 29, 1880, James A. Parkes filed the present bill against the same parties and for the same purpose. He states the fact of the filing of the previous bill by himself and brothers, and what was done with it as above. He sets out the facts of the case as therein recited, and adds other facts tending to show that the debt on which the judgment was recovered

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had been paid, and that the judgment was void for want of service of process, and because fraudulently procured to be rendered. He further alleged that the complainant's brothers had gone into bankruptcy, and that their interests in the land had been sold by their respective assignees, the interest of the one in 1876 and of the other in 1878, and that complainant had become the purchaser. By an amended bill it is stated that the papers in the suit of Lusk against Parkes, had been found by some one since the filing of the complainant's original bill, and it now appeared that the acknowledgment of service of the summons purported to be signed by Thomas Parkes himself on February 16, 1854, the day the suit was commenced; that complainant had caused the signature to be submitted to persons acquainted with the handwriting of Thomas Parkes, and, on information derived from them, complainant charged that the signature was not his. In this amended bill, there are some additional averments of facts tending to show that the debt sued on had been paid in 1853. The defendants demurred to the bill as amended, assigning as one cause of demurrer that it showed upon its face a former adjudication, which was a bar to the present action. The chancellor overruled the demurrer and the defendants appealed.

The bill as drafted leaves it uncertain what part of the facts detailed in it were not contained in the former bill of the 25th of April, 1876. There is a general statement that the facts have all come to the knowledge of complainant and his brothers since Jan-

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or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest." This section of the Code has been held to enlarge the remedy of the old statutes embodied in it, and to extend to a case where a suit was dismissed because the papers were lost and not supplied when the case was called for trial: *Cole v. Mayor, etc., of Nashville*, 5 Cold., 639. And to a dismissal by the plaintiff taking a voluntary nonsuit: *Memphis & Charleston R. R. Co. v. Pillow*, 9 Heis., 248. The argument in the suit before us is that the action was commenced within one year of the dismissal of the former bill, and that the dismissal was upon a ground not concluding the complainant's right of action.

The argument is based upon the fact, alleged in the bill, that the opinion of the court delivered in the former suit showed that the bill was dismissed upon the ground of lapse of time, "there being," says the opinion, "no excuse whatever given for failure to sue in a reasonable time—no allegation of infancy, or fraudulent concealment of, or even ignorance of their rights on the part of the complainants." The opinion adds: "We adjudge nothing as to the legal rights of complainants, only that from lapse of time a court of equity will not entertain a bill on its allegations." Perhaps it would be a sufficient answer to the argument to say that the dismissal, as the bill shows, was general, without reservation, and that, even if the opinion might authorize the court to modify the decree

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under the statute, it is conclusive on the rights of the parties as it now stands.

The section of the Code relied on, it will be noticed, only saves the bar of the statutes of limitation in the particular case provided for. The dismissal in question, according to the bill, was upon the ground of lapse of time, that is the laches of the complainants in not having brought their suit in a reasonable time after the accrual of their right of action. Laches is an equitable defense independent of the statute of limitations: *Smith v. Clay*, Amb., 645. But the section of the Code relied on does not, in terms, apply to a case of laches within the rule of a court of equity. It was only intended to save the bar of the statute of limitations in the cases specified. It would not otherwise change the effect of a former judgment or decree as *res adjudicata*.

What, then, is the effect of the former decree, conceding it to be, as stated in the bill, a decree, upon demurrer, dismissing the bill "alone upon the ground of lapse of time"? Would such a decree be upon the merits, and, therefore, necessarily concluding rights? In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined "on the merits," in the moral or abstract sense of these words. It is sufficient that the *status* of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases. The decision may be clearly wrong, or may be against the losing party because he offered in evidence a valid

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record or deed with a defective certificate, or otherwise failed to present his case as the facts within his knowledge, or obtainable by reasonable diligence, would have enabled him to do: *Thomson v. Blanchard*, 2 Lea, 528; *Nicholson v. Patterson*, 6 Hum., 394; Freem. on Judg., sec. 260. A former decree merely dismissing the bill, if not expressed to be without prejudice, is conclusive of the matters of litigation: *Williamson v. Hollingsworth*, 5 Lea, 358; 2 Sto. Eq. Jur., sec. 1523. A decree, upon a demurrer, may be equally conclusive: *Murdock v. Gaskill*, 8 Baxt., 22. The cause of action may be so changed as to prevent the estoppel of a former decree upon demurrer: *Grotenkemper v. Carver*, 4 Lea, 375. But if the cause of action is the same, the neglect of the party to bring forward his whole case will not, as we have seen, alter the effect of the judgment or decree as *res adjudicata*. A finding against a party, either upon final hearing or demurrer, that his cause of action as shown by him, is barred by the statute of limitations or by laches is a decision upon the merits, concluding the right of action. The section of the Code was clearly not intended to apply to such a case. A party proceeds at his peril who, when his attention is directly drawn to the defects of his bill by the demurrer of his adversary, fails to amend with facts then within his knowledge, or capable of being obtained by reasonable diligence, even in a case where the ground of demurrer is lapse of time or laches: *McEwen v. Gillespie*, 3 Lea, 204. The bill is not protected by the section of the Code relied on, and the former decree is a bar to the present suit.

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But the demurrer in this case is conclusive upon another ground. The judgment sought to be impeached was recovered, and the sales of the land sought to be set aside were had in the lifetime of Thomas Parkes. The statute of limitations, and the period from which to complete the time to constitute laches began in his lifetime. The fraudulent concealment of the cause of action to prevent the bar must have operated against him. Now it is a significant fact that the bill no where expressly alleges ignorance on his part of the transactions complained of. It is left to be inferred from the allegation touching the invalidity of the judgment. The complainant and his brothers, it is said, knew nothing of the land or the judgment. But the intestate must have known of his title to the lands, and may have known of the judgment and the proceedings under it. They were had openly according to the usual course of the courts and judicial proceedings. The public recovery of a judgment for a large amount, and the public sale of large bodies of land are not likely to escape the attention of the principal party interested. The fact that the acknowledgment of service of the summons was not signed by the ancestor himself does not necessarily imply want of knowledge, for he may have authorized it to be signed in his name by the very person who proved the acknowledgment, and there is no averment of the want of such authority. After the lapse of over twenty years, and the death of all the parties to the transaction sought to be impeached, nothing should be left

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to inference, and every intendment will be made against the pleader.

The decree will be reversed, the demurrer sustained, and the bill dismissed with costs.

JAMES DUNCAN v. A. M. BLAKE and FANNY H. BLAKE.

1. LESSOR AND LESSEE. *Quantum Meruit.* Where the lessor, under a lease of land for three years, in consideration of the lessee's clearing it, refuses to perform his contract, the lessee may sue for labor done and recover a sum expressed by the enhancement of the value of the land, less reasonable rent.
2. SAME. *Custom.* A farmer's custom that lessee, in consideration of clearing land, shall have the right to sell the cut timber, is good, and when clearly established, prevails where contract is silent.

FROM MARION.

Appeal from the Chancery Court at Jasper. W. M. BRADFORD, Ch.

W. D. SPEARS for complainant.

F. V. BROWN for defendants.

DEADERICK, C. J., delivered the opinion of the court.

This bill was filed by complainant to compel the specific performance of a contract of lease, made be-

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tween complainant and A. M. Blake, as agent of his co-defendant, or in the alternative for compensation for work and labor done upon a lot of about seventeen and a half acres of land belonging to defendant Fanny, in Marion county.

The contract was entered into by defendant A. M., for his co-defendant for three years, with the understanding and agreement on his part that it should be reduced to writing. This he afterwards refused to do, upon the alleged ground that complainant had not complied with his part of the contract.

The substantial stipulations of the contract were, that complainant was to have the land three years from the 1st of January, 1877, for clearing. Defendant A. M., insists that he was bound to cultivate it in corn in 1877, and this he did not do, and in this he violated his agreement.

About the end of 1877, A. M., in the name of Fanny, brought an action to recover the possession, and this suit was compromised, by which it was agreed complainant should surrender the possession, which he did do in March, 1878, without prejudice to this suit, which was then begun.

Fanny Blake was a non-resident of the State, and complainant, in this suit, attached the land he had leased, for the satisfaction of his decree. She answered and admitted A. M. had authority to manage and lease her land, and relied upon the same defenses that A. M. Blake relied on, that is, failure by complainant to perform his contract, and relied upon the statute of frauds as to the three years' verbal lease.

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There is much evidence as to enhanced value of the land by reason of the work done thereon by complainant. The master reported \$250 in favor of complainant, and upon exception the chancellor reduced this sum to \$210, and against this sum credited defendant with \$52.75 for rent, and rendered a decree against defendant for \$157.25, the value of the permanent improvements, less the amount due from complainant for rents, and directed the sale of the land attached for the recovery and costs, if the same were not paid in four months. From this decree defendants appealed to this court.

The defendants insist that the failure of complainant to put the land in corn in 1877, was a violation of his contract, and that he ought not, therefore, to recover. Assuming that such was the contract, it is difficult to see that any damage resulted from complainant's failure to defendants. They were not to have any part of the crop, and were only entitled under the contract to have the land delivered to them cleared at the end of three years. Indeed we think so far from this being intended as a part, or stipulation in the contract, it was more likely a mere declaration of complainant, of his intention to put the land in corn that season.

It is also insisted by defendants that complainant should be charged with the wood taken off the land and sold. The contract, however, contained no agreement that complainant was to account for any of the timber. On the contrary, he was bound to clear the land, and he might have burnt the fallen timber, and thus have complied with his contract. But he had

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some of it cut into cord-wood, for which he paid one dollar per cord, and then with his own team he hauled and delivered it to the railroad and others, and got one dollar and fifty cents per cord, obtaining for the hauling but fifty cents more per cord than the cutting cost him, and making but a reasonable compensation for his labor in getting the wood off the land. All the witnesses, who are farmers in the neighborhood, say that unless there is an express stipulation to the contrary, the lessee is entitled to the wood he takes from the land.

So we think, on neither ground is defendant Fanny entitled to be relieved from making just compensation to the complainant, to the extent that his labor has enhanced the value of the land. And from the evidence we think the amount allowed by the court is very reasonable.

The chancellor's decree, therefore, will be affirmed, except that the decree will be against the defendant Fanny alone for the amount found for permanent improvements, as she only has received the benefit of complainant's labor, and admits her co-defendant had full authority from her to manage and dispose of the land.

Long v. Read.

JAMES LONG, Guardian of Willimoth Stubblefield v. THOS.
R. READ *et al.*

RENTS. *Charges. Wills.* Where the testator directs that a child should receive a provision from the rents of a tract of land, thereby making the support of the child a charge upon the land, rents accruing subsequent to the child's death are liable for debts contracted previously by her guardian for her support.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville.
H. C. SMITH, Ch.

W. L. DICKSON for complainant.

SHIELDS & SHIELDS for defendants.

FREEMAN, J., delivered the opinion of the court.

Thomas Stubblefield, the father of Willimoth, died in Hawkins county in the year 1833. She was an afflicted idiot child, and by his will he made the following provision for her support: "After providing that persons to be appointed by the county court of Hawkins county, should lay off in one platt sufficient land for an ample support of his wife, and to enable her to raise his family of children, the same to be held by her during life or widowhood," he adds, "provided, nevertheless, my will is, out of *proceeds* of the

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land so laid off, there shall be an ample provision made for the maintainance of my daughter Willimoth (who is in a helpless condition), during her natural life—as well as to maintain my wife Patsy.” The remainder of his land he directed to be divided among all his children.

The mother's lands were laid off as directed, and she lived on them till her death in 1870. After her death, Long was appointed guardian of complainant. In the meantime, respondent Read had become owner by purchase of the remainder interest in the land, except that of Willimoth.

In 1871 this bill was filed, charging, among other things, that Read was seeking, since the death of the mother, to obtain possession of the land devised to her, and that there was a growing crop on the land, which the administrator was about to appropriate, disregarding the right of Willimoth to maintainance out of the proceeds of the lands, and further asserting a claim by her to be supported during the remainder of her life out of the tract of land assigned to her mother, and to her interest of one-eleventh of the remainder interest, which she had not disposed of.

Respondent Read answered this bill, in which he maintains that no legal or equitable estate in the dower tract, as it is called, passed to the daughter by the will, her claim amounting, as he says, to only a debt charged upon it, and, therefore, he insists on his right to own the land, subject to this charge, and he be bound to see to the support and maintainance of the daughter, by appropriating enough of the rents and

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profits of the land to this purpose. He denies that on a proper construction of the will, complainant has any interest in the remainder.

A receiver, Hugh G. Williams, was appointed to take charge of and rent out the property, soon after the bill was filed, and he ordered to hold the property or its proceeds, subject to the order of the court.

In this state of the case, the matters in dispute were referred to James T. Shields and R. M. Barton, to be by them adjudged as arbitrators. They reported that the daughter was entitled to an interest in the remainder of the testator's lands, and to an ample support during her natural life, from the lands devised to the mother—after first exhausting for that purpose her income from other sources, and directed an inquiry be made as to such income, and what would be a proper allowance for her support from both these sources. They further directed that the land devised to the mother be rented out annually to the highest bidder, and the rents appropriated to her support, so far as necessary after using her other income. They in addition ordered an account of rents since the death of the mother.

This award was confirmed by decree of the court, without objection on the part of any one.

In April, 1875, the master made his report in pursuance of the order of reference made under the decree confirming the award. He reported that \$400 per annum was the proper allowance for support of complainant. He also reported the amount of rent since the death of the mother, up to that date, and that

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the lands were then rented for the year 1875. The report was confirmed at May term, 1875, and the fund ordered to be paid out to particular charges specified in the decree.

The case proceeded, the fund being administered under the direction of the court, until November, 1877, when the accounts of the receiver was finally passed upon, and a decree made in favor of Long, the guardian, for \$222.07, to be paid out of the fund, and the balance to be paid over to Read, after costs had been paid.

It appears, however, in the proof, that Willimoth had died January 19th, 1875. So that the rent for the balance of the year 1875 and for 1876, amounting to upwards of \$900, were rents accruing after the death of the party entitled to be maintained during her natural life, both by the will and by the award and decree based thereon. Read has filed the record for error, and assigns for objection, that the decree appropriating these rents, accruing after the death of complainant Willimoth, is not authorized, and this decree should be reversed.

The question is, whether maintainance, or debts due for such maintainance, if not paid before the death of the party entitled to be maintained out of the proceeds of property, are or are not entitled to be held a charge on the proceeds of the property after the death of the party who is entitled to be maintained?

It is argued this is like the debt of a dowress, which cannot be enforced against her dower after her death, the estate ceasing on her death. But is this

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such a case? The respondent, in his answer, insists that the true construction of the will is, that the daughter had no estate in the lands, but only a charge for maintenance on the proceeds—and in this he is correct. The analogy then fails between this and the case of the dowress, who has a life estate in the land, terminating absolutely by her death.

As said by Judge Cooper, in the case of *Anderson v. Hammond*, 2 Lea, 287: "The question in all this class of cases is one of intent on the part of the testator." That intent is to be arrived at from the language used, and the nature of the thing to be done, the motives that prompted the gift, in connection with the circumstances of the case. We take it, that the question is to be tested by the fact, whether it is an estate given in the land, or whether the maintenance is to be a charge on the land, or its products. If the latter, then as the maintenance accrued, it so attached, and the death of the party would not discharge the right thus attached. It would only prevent any accumulation of indebtedness for the future.

That maintenance was a charge on the product of the estate is conceded by the respondent; but his theory involves the proposition, that if the party entitled to such maintenance dies before actual appropriation to this purpose, the debt is discharged—and so far as this source of payment is concerned, is gone. In the nature of the thing, this was not the intention of the testator. It being a charge on the produce of land, it must necessarily be received at the end of, or during the year, as produced. The daughter must be

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maintained at all times, and so debts would of necessity, in all probability, be incurred, or the right of maintenance accrue. We cannot suppose that these debts were not intended to be paid, in the event the child died before the product of the land could be realized. This would have left her support upon a most precarious basis, as no one could supply immediate wants, except by taking the risk of loss in the event of her death before the crop could be gathered and marketed during the life of the mother, or the rents collected after her death. This contingency of death would hang over every year's support during her life, as no one could make any calculation as to when that event would take place, though in fact the debt for maintenance might be discharged every year, except for the period immediately preceding the death of the party. The testator did not intend there should be any impediment, or contingency hanging over the provision he had made, that would in the slightest degree interfere with the assured comfort of his afflicted child.

The result is, we hold the charge was one that properly attached to the product of the lands, before the death of the party, and having so attached, was rightfully discharged out of the rents after her death. This conclusion is made clear by the ruling of this court in the case of *Anderson v. Hammond*, 2 Lea, 286, and cases cited, that the devisee of property charged is usually personally liable for the payment of the charge. Suppose in this case the heir had gone into possession and received the product of the land, it is clear he would have been personally chargeable, as with a debt.

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This debt once legally contracted, could only be discharged by payment. If this be so, the principle is the same in this case, where the land is in custody of the court for the purpose of enforcing the charge, and the rents appropriated are thus received and paid out: See cases cited by Judge Cooper, 2 Lea, 286.

We need not look into the question of the reasonableness of the amount allowed for her maintainance, as that question is not in condition to be reviewed by us in this record. The reports were made by the clerk and master, and confirmed by the court, without objection on the part of the respondent, he having the right to except, as he was entitled to the surplus, after maintaining her. No exception having been taken, it must be assumed he acquiesced in the correctness of what had been reported by the master.

We do not think there is reversible error in the failure to revive in the name of the administrator of Willimoth, after her death. The real contest, then, was between Read and the party who claimed to have the fund appropriated to pay for her support. If this right is conceded, then it would be a useless form to have the administrator a party, when the fund would be directly appropriated to the other claimant in its proper administration by the court.

The result is, the decree of the chancellor must be affirmed with costs.

Arnold v. Jones.

F. A. ARNOLD, Adm'r, etc., of T. D. Arnold, deceased, v.
JAMES JONES.

1. TRUST ASSIGNMENT. *Renunciation.* An attachment suit was compromised by the son and heir of the original defendant, conveying the attached land in trust to secure the debt, and the attachment was dismissed; the creditor discovering that the father subsequent to the attachment had, by voluntary deed, conveyed the land attached to the son for life, with remainder in fee to the son's children, filed a bill for a rescission, expressly renouncing the security of the trust assignment and praying for the restoration of his attachment lien; the rescission was denied and the bill dismissed; the creditor subsequently bought the land at the trustee's sale, and brought ejectment against the son. *Held*, the bid for rescission was only a conditional renunciation of the security of the trust assignment, depending upon the restoration of the attachment lien.
2. HOMESTEAD. *Circuit Court. Ejectment.* The circuit court may assign homestead in an action of ejectment, and though it is more regular to lay off homestead before giving plaintiff final judgment for the residue, the court will not reverse because the circuit judge gave plaintiff judgment for the land excepting homestead, which was subsequently assigned.
3. SAME. *Life-estate. Valuation.* Homestead is in all cases a tract of land in which the fee, and not the estate owned by the defendant, is worth a thousand dollars.
4. SUPREME COURT PRACTICE. *Ejectment. Judgment on bond.* Upon affirmation of a judgment for plaintiff in an ejectment suit where defendant has given bond pending appeal as required by act of 1879, this court will order a writ of possession and give judgment for rents, and remanding cause for proof and enquiry as to amount of rents and damages.

FROM GREENE.

Appeal in error from the Circuit Court of Greene county. N. HACKER, J.

Arnold v. Jones.

H. H. INGERSOLL and A. B. WILSON for Arnold.

ROBERT M. MCKEE for Jones.

FREEMAN, J., delivered the opinion of the court.

This is an action of ejectment, tried in the circuit court of Greene county, to recover a tract of land conveyed by one Baker, as trustee, to plaintiff.

This land had been attached by bill in the chancery court, by the intestate of plaintiff, for payment of a debt against the ancestor of the maker of the deed of trust, and a decree had in his favor. It had been conveyed in 1866, we believe, by the debtor to his son, James Jones, which conveyance was attached in the bill as fraudulent. Thomas Jones, Sr., having died, the son compromised the chancery suit by giving his note to T. D. Arnold, and the deed of trust to Baker to secure it. The deed of trust purported to convey a fee simple interest to the trustee, but in fact it turns out that Jones, Jr., had only a life estate in the lands conveyed. T. D. Arnold, learning this fact, filed his bill to have the contract of compromise set aside as fraudulent for this cause, but had a decree against him ultimately, and his bill dismissed.

The trustee afterwards sold the land under the deed of trust, and plaintiff purchased the same, as we take it, bidding his debt, with costs of executing the trust.

In the bill filed by Arnold to rescind the contract of compromise and be restored to his position under his attachment bill, he insists on his right to repudiate the contract, on the ground that the fact of the

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limited interest of Thomas Jones had not been disclosed to him.

The wife of Jones did not join in the trust deed, and he is conceded to have been the head of the family, and they were occupying the land as a home when the deed of Jones was made to Baker.

The case was tried by the circuit judge, without the intervention of a jury, who gave judgment for the plaintiff, but ordered commissioners to lay off the homestead for Jones and wife, he holding that this did not pass by the deed of trust, the wife not joining therein. From that judgment an appeal was 'prayed to this court, but the case was reversed because no final judgment had been rendered. When the case was remanded, the commissioners made their report, assigning homestead, the report was excepted to, exceptions overruled, and now the whole case is before us for review of the action of the court.

It is first insisted, that the trustee's deed conveyed no title, because the benefits of the trust had been repudiated by Arnold in his bill, and there was no trust to execute. It was not a refusal by a party provided for in a deed of trust to accept the security, but was a bill filed to rescind a contract, embracing several other matters, for fraud and to be restored to important advantages had under the chancery decree, and which had been yielded in consideration of the contract, of which the trust security was but a part. It would be hard if, after having been beaten by the debtor in this effort, and he decreed to stand on his contract, his failure to rescind should now be held

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equivalent to success. This objection cannot be maintained.

It is next insisted, that no homestead exists by our law in a life estate. To this we do not assent. A homestead, the home in possession of each head of a family, and the improvements thereon to the value of one thousand dollars, shall be exempt from sale, etc., is the language of our constitution and statutes: Code, secs. 2110*a*, 2114*a*. The liberal policy of these laws forbids that we should give them a narrow or technical construction as against the parties intended to be provided for. If the homestead, the place of residence and home of the family is protected, where the head of the family owns the fee, much more, it seems, it ought to be in favor of the poorer man, who has only an estate less valuable, liable to be determined at any time by his death.

A nice question is presented as to what shall be the mode or basis for ascertaining the value of the homestead in a limited estate like this. Shall it be a life estate worth one thousand dollars, or a portion of land with the improvements, the fee of which would be of that value?

The report does not show whether it was the fee simple value of the land laid off, or the value of a life estate in said land. The exception filed by defendant assumes it was the former.

No error appears, at any rate, on the face of the report, and there is no proof. But assuming the exception has given the fact, we hold that a tract of land, with the improvements, the fee simple of which

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would be worth a thousand dollars, is the true basis of the homestead in such a case.

The court found for the plaintiff as to all but the homestead, and directed a special writ of possession to issue, requiring the sheriff to lay off the homestead, furnish the defendants with the description of the land so laid off, and put plaintiff in possession of the balance.

It is again urged, that the court in rendering its judgment was bound to find for plaintiff or defendant, and give judgment accordingly, and execute that judgment. That it had no authority to appoint commissioners to lay off the homestead in the way it was done.

We have no statute providing for this precise case. We have one providing for laying off the homestead under the direction of an officer levying an execution or attachment, but that is not this case. The court found by its judgment, and properly in accord with our decisions, that the homestead did not pass by the deed of the trustee.

It could not, therefore, award a writ of possession as to it, because it was not recovered. The plaintiff, however, was entitled to the other land, and a writ of possession for the same. It therefore became a necessity for the court, in order to the proper execution of its judgment, to ascertain the homestead, or that it be done in some way under its authority. This could more properly be done before rendition of judgment, or else the judgment could not define the measure of recovery given by the court. When laid

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off by the sheriff, as in this case, it was subject to exception on contestation, and might not be sustained, and all have to be done over.

In the action of ejectment the judgment is executed by a writ of possession issued to the sheriff, directing him to put the plaintiff in possession of the premises: Code, sec. 3251. To do this in the present case, before the homestead is laid off, would put the parties to the trouble and expense of another suit to have the homestead laid off, and then a writ of possession to be restored to possession, or a writ of restitution on the part of the court dispossessing them wrongfully. It would seem that all this should be avoided, under the principle of the common law, that every court has the inherent power to enforce its own decrees, which must necessarily involve such convenient legal means as will effectuate the end.

Sec. 2997 of the Code provides: "If a judgment or decree be that a party recover or be put in possession of the specific property, real or personal, the court may carry the same into effect by writ of possession, or other process sufficient for the purpose. A liberal construction of this section, the purpose of which is to give the court an appropriate means for the execution of its judgments, would fairly include the means directed by the court in this case.

Under sec. 3247, taken from the act of 1852, requiring the jury to specify such part of the land as is recovered, where only part is recovered, it was held by this court, that where the jury failed to do this, it was the duty of the court to delay the case until

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proper surveys or additional proof could be introduced, by which the proper certainty could be had. This was held on the ground that it was essential to the rights of the parties litigant: *Load v. Philips*, 4 Sneed, 567-8; *Brogan v. Savage*, 5 Sneed, 689. Upon the same principle, and from a stronger necessity in this case, we hold the court might well ascertain the land recovered, by having the homestead laid off before the other property should be put in possession and the defendants turned out. In any view, if the act was authorized, the time when it was done would not be matter of substance going to the merits, for which this court ought to reverse.

The bond given in this case, on obtaining the writ of possession, is the one authorized by the act of 1879, sec. 1. See acts, p. 111.

Affirm the judgment.

Since the opinion was delivered in this case, a question of practice is submitted on the bond given under the act of 1879—see acts, p. 111—by defendants.

This act provides substantially that on a judgment being given for the plaintiff in an action of ejectment, and the defendant appeals to this court, plaintiff may have his writ of possession immediately on giving bonds with security in double the value of two years' rent of the premises—and another to pay all costs and damages which may be sustained by the defendant from plaintiff wrongfully enforcing said writ, and that he will abide by and perform the judgment of the su-

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preme court on final hearing of the cause. But it is further provided that the defendant may execute a like bond to the plaintiff, and thereby remain in possession.

The defendant executed the bond as provided for in this case in the sum of five hundred dollars, conditioned to pay, in case of affirmance, to the plaintiff all rents, costs and damages that may be sustained by him for the non-issuance of said writ of possession.

Two questions are submitted: First—Whether the plaintiff is entitled to judgment upon the rent bond in this case? Second—Whether that judgment shall be based on the amount of rent fixed by the court below, as shown by the bond?

The bond is dated May 3d, 1881.

We conclude the proper practice is, to order a writ of possession immediately—giving judgment for rents—and remand the case for proof and inquiry as to what shall be the amount of the rent and damages, if any, and that the court render judgment for the amount so ascertained.

Kincaid v. Burem.

CAROLINE KINCAID v. A. L. BUREM AND WIFE *et al.*

HOMESTEAD. *Mode of conveyance.* Previous to the constitution of 1870, the husband could convey valid title to the homestead without the concurrence of the wife, even where he declared his intention to claim the homestead, in the manner then provided by law, unless the homestead had been actually laid off.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville.
H. C. SMITH, Ch.

— — — for complainant.

A. D. HUFFMASTER for defendant.

FREEMAN, J., delivered the opinion of the court.

Complainant is the wife of A. Kincaid, who owned the land out of which homestead is sought in this bill. In May, 1866, and consequently before our present constitution and law passed in pursuance thereof, said Kincaid made out and caused to be registered his declaration of intention to claim a homestead under Code, sec. 2114, describing the land as one tract of land lying in Carter's Valley, on the waters of Big Creek, in civil district No. 8, adjoining the lands of William E. Carmichael and others. In November, 1866, the husband sold this tract of land, and conveyed it to

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E. E. Gillenwaters, the wife not joining in the deed. The present defendants claim under Gillenwaters. The question is, has complainant a right to recover homestead in the land under the state of facts given.

It has been held in the case of *Bilbrey v. Poston*, 4 Baxt., 232, that under the law as it stood at the time of this conveyance, the husband could sell his land, and defeat the homestead, without the wife joining in the conveyance. There had been no declaration filed in that case as in this.

In the case of *Kennedy v. Stacey et al.*, 1 Baxt., 220, Judge McFarland stated the law to be, that there was no prohibition against husband's selling the land, nor requirement that the wife should join in a conveyance, unless the homestead had been laid off, as required by the sections of the Code then in force.

After careful examination, we think this statement is, beyond question, the true construction of the sections referred to, to-wit, secs. 2114 to 2119 inclusive.

The object of the statute was to protect, by declaration filed and registered, from execution or attachment against the head of the family. It is then provided how the homestead shall be laid off in case of levy and sale, and then requires registration of the report of freeholders, by the debtor, within twelve months after a delivery of a certified description of the land set apart; and when so registered, it vests in the debtor exempt from execution. Then by next section, 2119, it is declared that "the homestead so set apart shall not be aliened by the owner, if a married man, except by the joint deed of husband and wife."

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It is seen that the case provided for, in which the wife is to join in the deed, is not the case presented in this bill.

The result is, the chancellor's decree dismissing the bill on demurrer, must be affirmed with costs.

C. D. MCGUFFEY, Adm'r, v. H. W. JOHNSON *et al.*

BILLS AND NOTES. *Endorser.* *Agreement of maker to pay out of proceeds of a particular note.* An agreement by the intestate in his lifetime with an accommodation endorser that he will, in consideration of the endorsement, pay the debt out of the proceeds of a particular note when collected, although in parol, and *a fortiori* if recognized by the intestate in writing, would be binding, and operate as an equitable appropriation of the specific fund, which would not be affected by the death of the intestate and the insolvency of his estate, the appropriation of the fund having been formally directed by the intestate in his lifetime.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W. B. STALEY, Ch.

W. M. BAXTER and HENDERSON & JOUROLMON for complainant.

T. S. WEBB and GEO. WASHINGTON for defendants.

McGuffey v. Johnson.

COOPER, J., delivered the opinion of the court.

Charles D. McGuffey, as administrator of James B. Johnson, deceased, filed his bill against the heirs and creditors of his intestate for the administration of the assets as an insolvent estate. John Baxter became a party defendant, and filed a cross-bill claiming a specific appropriation of certain funds of the estate to the satisfaction of a particular liability of the intestate by note on which he, Baxter, was the accommodation endorser. The chancellor decided adversely to Baxter, and he appealed.

In October, 1873, the Knoxville University purchased from James B. Johnson a small tract of land for about \$5,000, executing to him its several promissory notes therefor, with John Baxter, John F. Spence and Wm. Rule as sureties. One of these notes was for \$1,000, which Baxter paid or settled, and another for \$1,126, payable March 1, 1874. Johnson being pressed for money, applied to Baxter for the payment of these notes, and he paid the note for \$1,000, and endorsed for Johnson's accommodation his note for \$1,000, dated 12th of August, 1874, at three months, which was discounted by, or became the property of the People's Bank. Baxter claims in his cross-bill that he endorsed this note upon the condition that Johnson would apply the proceeds of the note for \$1,126, when collected, or so much thereof as might be necessary, to the payment in full of the note for \$1,000 made to the People's Bank. On October 25, 1875, judgment was recovered by McGuffey, as ad-

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ministrator, against the sureties on the note for \$1,126, and the greater part of this judgment has been collected. The estate of Johnson is insolvent.

No proof has been introduced in support of Baxter's claim. It is sought to be supported upon the admissions in the answer of McGuffey. He says, in his answer, that he received the note for \$1,126, and another note of the Knoxville University with the same sureties, for \$1,000, from the Exchange and Deposit Bank then owned by Baxter, "and respondent presumes they were there at the date of the note given to the People's Bank." He adds: "Respondent certainly had instructions from Johnson to pay that note out of the proceeds of said (two) notes which were afterwards reduced to judgment by him as administrator. but he had no information from Johnson to the effect that any agreement had been made that it should be done. Respondent has lately, with a view to this question, examined a number of letters which he received from Johnson after his departure for Colorado, (which took place very soon after giving the People's Bank note), and the letters show great anxiety to pay up the said People's Bank note, and also the note assigned to Broughton, Ford & Co., (one of the Knoxville University notes), and a great desire to collect the Knoxville University notes, but the only thing respondent finds in any of them that might be considered as alluding to any question of legal right in the matter is a letter written from Greely, Colorado, October 26, 1874, in which he says: 'P. S. As Baxter may try to stay legal proceedings by holding the

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Knoxville University notes as security for his endorsement at People's Bank, perhaps you had better get them now anyhow.' * * The sentence quoted is the only one (in the correspondence of Johnson with respondent) respondent can find which makes any reference to said notes being held in any way as security for the payment of said People's Bank note. There is, however, a letter written by James B. Johnson to his brother Henry W. Johnson, which is in respondent's possession, which contains the following, viz: 'I left three notes, aggregating \$3,126, with the Exchange and Deposit Bank for collection, from proceeds of which John Baxter receives \$1,000, and interest, 10 per cent, from September 1, really has proceeds of one \$1,000 note, from the proceeds further is to be paid \$1,000 loaned me by the People's Bank when due, balance will be put to my credit, and used in adjustments. These notes are past due, and will probably be paid within sixty days.' Said letters bear date September 16th, 1874, at St. Louis, while Johnson was on his way to Colorado for his health." The respondent adds that he had paid into court, under its order, the money collected by him on the University notes.

Baxter's claim is that he endorsed the note to the People's Bank for the accommodation of Johnson, in consideration of the promise of Johnson to apply so much of the proceeds as might be necessary of the note for \$1,126, when collected, to the payment of the note to the People's Bank. Such an agreement, although in parol, would, as between the parties, constitute a binding contract, and be an equitable appro-

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priation of a specific fund, upon a sufficient consideration, to the satisfaction of a particular debt. But the letters of the intestate, quoted in the answer of the administrator, recognize the agreement, and the last cited letter expressly directs so much of the proceeds of the University notes mentioned, manifestly meaning the notes in controversy, as may be necessary to be paid on the People's Bank note, and only the balance put to his credit, and otherwise used. It is true, the intestate does not say in so many words that there is an agreement to that effect between him and Baxter, but what he does say fairly implies such an agreement, when taken in connection with the facts stated or conceded in the answer. The statutes regulating the administration of insolvent estates were not intended to affect, and do not affect liens, equitable or legal, acquired and perfected in the lifetime of the deceased. It is only what remains after the discharge of the incumbrances that goes into the fund for distribution: *Fields v. Wheatley*, 1 Sneed, 351; *Winton v. Eldridge*, 3 Head, 362; *Kinsey v. McDearmon*, 5 Cold, 399; *Henderson v. McGhee*, 6 Heis., 55.

Reverse the decree, and render a decree for the petitioner with cost.

Stranahan's Heirs v. Terry.

STRANAHAN'S HEIRS v. MARY JANE TERRY.

EJECTMENT. *Evidence.* The declarations of one in possession of land as to his holding, where no tenancy of any kind is shown except the declarations sought to be proved, are incompetent as evidence.

FROM BLEDSOE.

Appeal in error from the Circuit Court of Bledsoe county. D. C. TREWHITT, J.

LEWIS SHEPHERD and D. L. SNODGRASS for Stranahan's heirs.

T. J. R. SWOFFORD for Terry.

FREEMAN, J., delivered the opinion of the court.

This is an action of ejectment from the circuit court of Bledsoe county. Plaintiffs had judgment for the entire tract of land, four or five hundred acres, from which the defendant has appealed to this court.

Plaintiffs claim by descent, as heirs of J. W. Stranahan, who is claimed to have purchased the land under a decree of the chancery court in February, 1868.

The plaintiffs attempted to show a claim of title from the original grantee. The land was granted to Whitesides and Terry. The only proof as to a conveyance from Whiteside to Terry, whose title is asserted to be in plaintiffs by the decree, is the state-

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ment of a witness that Terry had at some period purchased the land, giving a horse valued at one hundred dollars for it; but whether he took a deed or title bond for it, he did not know. This testimony was objected to and objection overruled. In this there was error. There is no rule of law authorizing title to land to be thus proven. Whether such testimony might not have been admissible as secondary evidence, in case of proof of loss of the deed, or on proper basis laid for it, we need not now determine. No such basis is laid, and the testimony was clearly incompetent.

This is sufficient to reverse the case, as the recovery is for the whole tract. We may add, that there is no competent evidence in this record, that Terry was in possession of this land at the time of the sale. It is true the plaintiffs say that they found a Mrs. Metcalf in possession before the sale, and she said she was holding under Terry; but no tenancy is shown, or connection between her and Terry; and as no estoppel was sought to be set up against her, as in the case of *Marley v. Rodgers*, 5 Yer., 220, we cannot see how her declaration can be held to affect the defendant in possession of the land in this case. She is not bound by any declarations that any trespassers may make. Such party is an entire stranger to her, and it would be to deprive her of her possession in this case by mere declarations of a party found on the land, of which she never heard, and over which she had no control—made without her authority, express or implied. While the principle is correct, that in

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many cases the declarations of a tenant may be proven to show the character of his possession, this well-settled rule has no application to a case like the present. It applies in all cases where the question is, whether the tenant be holding for the one party or another, and where the question at issue is, as to which party he is tenant. But as we in other cases have said, it does not apply to a case like the present, where there is neither an effort to estop the tenant or one claiming under him, nor to settle the question of whose tenant he is, as between the parties to the suit. The defendant does not claim that she was her tenant, nor is there any issue between her and plaintiff as to which was the landlord. It is pure hearsay testimony—the statements of a party as to his holding, when no tenancy of any kind is shown, except from the declaration sought to be proved. This would open the door to fraud and collusion between an occupant, it may be a mere trespasser, by which the true owner might be deprived of his land by the mere loose declaration of a party with whom he had no connection, and who had no authority to speak for him. The principle is thus stated in Stephens' Digest of Law of Evidence: "A statement by A., a deceased tenant for a term of the land in question, that he had no such right as claimed, is relevant as against his successors in the term, but not as against the owner of the field." Page 43-44—note G.

For this error the judgment must be reversed and the case remanded for a new trial.

Prigmore v. Shelton.

PRIGMORE *et al.* v. M. E. SHELTON *et al.*

AND

PECK v. M. E. SHELTON *et al.*

VENDOR AND VENDEE. *Covenants.* . In the absence of fraud, accident or mistake, the vendee must rely solely upon his covenants from the vendor for relief; thus, the vendee of a purchaser at a sheriff's sale, which is void on account of tracts not contiguous being sold as one body of land, whose deed contains no other covenant than special warranty, has no remedy as against his vendor.

FROM MARION.

Appeal from the Chancery Court at Jasper. W.
M. BRADFORD, Ch.

W. E. DONALDSON for complainant.

W. D. SPEARS for defendant.

FREEMAN, J., delivered the opinion of the court.

Upon careful examination of this very large record, we find it turns solely on two questions.

First—Whether the title is defective to the land purchased by Mrs. Peck from Mrs. Shelton, and such a defect as would entitle her to a rescission under her cross-bill, because sold in gross by the sheriff under an order of sale from this court, when the same consisted of separate and independent tracts, not connected with each other, and treated by the owner as making one body.

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Second—Whether, under the facts in the record, and the covenant of special warranty in the deed from Mrs. Shelton to Mrs. Peck, she can take advantage of such defect, or must stand alone on her covenant of special warranty.

To the first question, we are compelled to answer, the sale of land was in gross, and the lands sold were independent tracts; at any rate, the large body was separated from the smaller tract by at least half a mile, and the lands of Prior and Haley intervened between the smaller tract and the other.

Our cases have intimated, and we think correctly, that strangers, who had no claim to be enforced against the land whatever, might not be permitted to interpose this objection, the creditor whose lands had been sold, himself acquiescing in it, and that in other cases perhaps the acquiescence of all parties might be to such an extent as to estop them from denying the validity of the sale: 2 Lea, 120. This case, however, does not come within any suggested exception, as we see the heirs of Peck, who were the defendants in the execution, or order of sale rather, under a *sci. fa.*, were all minors at the time of the sale, and so far as we can see, remain such at the present time. Under these circumstances, any acquiescence on their part could not affect them by way of estoppel; and a court of equity would not require a party to take a defective title, nor hold this a valid one, that may be subject to be defeated by the heirs on coming of age, or any one of them, to the extent of his interest, until the last one shall attain majority.

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But the other question is conclusive against the complainant in the cross-bill, under the rule given in the case of *Lowry et al. v. Brown et al.*, 1 Cold., 460. It is, that "The rule is well settled, and is presumed to be known to any purchaser of real estate, that in the absence of fraud, his only indemnity, in case of failure of title, depends on the covenants in his deed; and if he accepts a deed without sufficient covenants for his security, and there be no element of fraud, mistake or other equity in the transaction, he takes the title at his own risk, and is without a remedy, either at law or in equity, in the event of a failure of title:" Citing 4 Kent's Com., 522—notes. There is in this case, as in that, no explanation to repel the presumption, that the vendor refused to give a broader obligation, because of mutual knowledge or suspicion of defects of title. On the contrary, she was party to the sale—was guardian of the heirs, her children—and so may be held to have had knowledge of the sale, and its defects, if any. Other circumstances found in the record aid this view, which we need not refer to, as this is conclusive of the result of the case.

We do not deem it necessary to discuss the several other questions argued by the learned counsel. We find nothing in them, either in law or in the facts advanced in support of them, on which a reversal can be predicated. The decree, however, will be amended so as to show that the dower of Mrs. Peck is not to be affected.

The result is, that the decree of the chancellor must be affirmed with costs.

Watterson & Riley v. Lyons.

WATTERSON and RILEY, Admr's. v. WM. F. LYONS.

1. **ESTOPPEL.** *Party to suit.* Where, under bill filed by trustees of a corporation against its stockholders, one of the stockholders obtains a suspension of the decree, gives a deposition and receives various notices of taking accounts, depositions, etc., he is estopped, in a collateral suit to allege or prove he was not served with process.
2. **SAME.** *Admissions.* An admission made in an answer is a solemn admission *in judicio*, and estops the party to deny the admissions afterwards in another suit.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville. H. C. SMITH, Ch.

SHIELDS & SHIELDS for complainants.

KYLE & McDERMOTT for defendant.

TURNER, J., delivered the opinion of the court.

It is charged that W. F. Lyons was the owner of three shares of stock in the real and personal property of the Rogersville Female College. That he transferred, by writing, that stock to John D. Riley, that no transfer was made on the books of the College.

On the 27th of February, 1866, James T. Shields and F. M. Fulkerson, trustees, etc., filed a bill against various parties in interest, for a settlement of the business of the stock company, and a sale of the property. It is now charged that defendant was a party

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defendant in that proceeding. That a decree was rendered in which the defendant was allowed the sum of \$585. And was allowed an offset to that amount upon his ascertained indebtedness to the company.

The question to be determined, is, W. F. Lyons estopped to deny that he was party to the suit of the trustees? The facts are that, when the account was to be taken, special commissioner, Yoe, on June 25, 1873, issued a notice to Thomas McDermott, solicitor, and W. F. Lyons, which was returned, "Executed in full as commanded, on July 2, 1873. C. C. Spears, Sheriff."

Another issued October 2, 1873, addressed to F. M. Fulkerson and W. F. Lyons, and returned endorsed, "Executed by delivering W. F. Lyons a true copy of the within notice, October 21, 1873. J. B. Dykes, Deputy Sheriff."

Similar notices were subsequently issued and service acknowledged by the solicitor for W. F. Lyons.

In the progress of the cause, this report of the commissioner appears, "James T. Shields and F. M. Fulkerson, trustees, etc., v. O. Rice, and others. By decree pronounced in this cause at a former term of the court, a reference to the master was made to report upon various matters, which was afterwards reviewed and referred to the undersigned for report, which reference has been, from time to time revived, and the commissioner having given due and legal notice since last term, and taken all the proof offered, now shows the court that the proof before him is still insufficient to enable him to report fully upon all the

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matters submitted to him, but by consent of the parties in interest the commissioner will report upon the matter submitted to him as between complainants and W. F. Lyons."

In this report is a statement of the account of W. F. Lyons as to shares of stock, etc., referring to former reports, in one of which this language occurs: "On page 32 of said report, the master reports that there was a balance due from W. F. Lyons with interest to September 7, 1868, the sum of \$143.19. At the March term, 1868, a decree was pronounced against W. F. Lyons for said sum of \$143.19. Upon these facts the following order was made and referred to the undersigned":

"It is ordered that the said W. F. Lyons may show, by proof, that the former report and decree of March term, 1869, did him injustice, if he can, and if he does so, the special commissioner will report accordingly."

Upon this reference the deposition of W. F. Lyons was taken, and the commissioner reported:

"W. F. Lyons has given his deposition in the cause since said order was made, in which he disclaims any and all interest in the *pro rata* of \$585 declared upon the two shares of stock assigned by C. J. McKinney to him, and for which he received a credit, and asserts that the same belongs to J. D. Riley. After a careful examination of all the proof on file, including the books of said association, receipts, depositions and other evidence, the commissioner is of the opinion that errors do exist in said report, but he

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is not of opinion that the report of the master and the decree pronounced thereon did Wm. F. Lyons any injustice." There the matter was left to rest by Wm. F. Lyons.

On the 4th of May, 1871, J. D. Riley filed a bill against W. F. Lyons for the purpose of recovering the \$585, or sought to be recovered here. Lyons answered, admitting the sale and assignment of the stock, that he was a party to the suit of Shields and Fulkerson, trustees, etc., but denied any indebtedness to the company. A trial was had on bill and answer, when the bill was dismissed without prejudice.

The present bill was filed February 1, 1878. In his answer, Lyons admits the filing of the bill by Shields and Fulkerson, but "positively denies that he was made a party to that suit." He says, "It is true, that by mistake and inadvertence of his counsel, he admitted in an answer to Riley's former bill, that he was made a party defendant to said suit, but denied that he was ever summoned. He now finds, upon inspection and careful examination of the whole record, that he was neither a party complainant or defendant, or was summoned to defend such action, nor did he have any knowledge of the existence of such suit until long after the decree entered in the cause in 1869.

This answer is supported by his own deposition and that of his solicitor, and also by that of the officer who had process in the cause.

The question, as we have said, is, is he estopped to deny that he was a party and bound by the decrees in that case, under the facts recited? A decree

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was pronounced against him. By consent that decree was suspended at a subsequent term, and he gave his deposition to show its incorrectness, he failed and submitted, and by his conduct, the stock of Riley, to the amount of \$585 was applied in discharge of his indebtedness. After these things, and when the account is proceeding, he appearing on the books of the company as a stockholder, and the interests of the several stockholders and their several indebtedness are being inquired into with a view to final settlement, he receives notice after notice without objection, and in the settlement receives a benefit at the cost of the complainant.

In 1871, while the account is progressing, he solemnly admits in a judicial proceeding, that he was a party to the suit of the trustees. To allow him now to take advantage of the defense that he was not technically a party, when he was so actively, and benefitted by an appropriation of the effects of Riley, would amount to holding that he may take advantage of his own wrong and by it discharge himself from liability both to the College fund and to Riley. The College estate has been wound up and finally settled, and Riley can have no relief there. If relief in that direction ever existed, it has been lost by the statute of limitations through the conduct of Lyons, upon the maxim that a man is to be held responsible for the consequences of his own conduct, Lyons ought not to be heard to complain in this case.

In addition to his participation we think he is estopped by his answer in chancery. In Greenleaf on

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Ev., sec. 27, vol. 1, it is said, "In addition to estoppels by deed, there are two classes of admissions which fall under this head of conclusive presumptions of law, viz, solemn admissions or admissions *in judicio*, which have been solemnly made in the course of judicial proceedings either expressly, and as a substitute for proof of the fact or tacitly by pleading, and unsolemn admissions, extra *judicium* which have been acted upon, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith."

The facts in this case brings it directly with the rule laid down as to both classes of admissions.

The decree of the chancellor is reversed, and decree here for complainant, with costs.

PAUL J. ROBERTS *alias* FULTONER v. ANDREW W.
McMILLAN *et al.*

WILLS. *Probate in solemn form.* A devisee, a stranger in blood to the testator, has a right to have the will probated in solemn form upon petition to the county court.

FROM KNOX.

Appeal in error from the County Court of Knox county.

Roberts v. McMillan.

JAMES COMFORT for Roberts.

JEROME TEMPLETON for McMillan.

TURNER, J., delivered the opinion of the court.

On the 12th day of April, 1869, Andrew J. Baker made his will in this language:

1. "I give and bequeath to my beloved wife, Lucinda, her support and maintenance during her natural life."

2. "After the death of both myself and dearly beloved wife, Lucinda, and our funeral expenses are paid, I will and bequeath my entire estate to Paul J. Fulton and Martha Jane Murphy, to be equally divided between them."

An executor is nominated and the will properly attested. Baker died in 1881. The petition alleges that after the publication, but whether before or after the death of the testator, is not known, the words "Paul J. Fulton" and "to be equally divided between them," had pencil marks drawn across them as if to erase them.

In this condition the paper was propounded for and admitted to probate as the last will and testament of Andrew J. Baker. The will was first entered of record leaving out the words crossed in pencil. Subsequently there was written across that entry in red ink the words "error, see page 162," at which page the will is spread of record, including the omitted words with pencil marks just as the original.

This petition is filed in the circuit court for a re-

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probate of the will, leaving off the pencil marks, or if this cannot be done, that petitioner have such other relief as may be warranted by the facts. The county court made no adjudication or intimation as to the effect of the pencil marks, but simply admitted the will to probate, and it was entered upon the record in the exact condition in which it was presented. In my opinion that court had no jurisdiction, several terms after its action, to cancel its proceedings upon the petition before us. Whether it was the purpose of the court to reject or retain the marked words does not appear.

The executor having qualified and entered upon the duties imposed by the will must discharge them at his own risk. If he shall refuse to recognize the claim of petitioner in the administration of the estate, petitioner's remedy, if he have one, is not in the court of probate, but in another forum.

The majority, however, is of opinion that the county court had and should have exercised the jurisdiction of having the will presented for probate in solemn form, citing *Burrow v. Ragland*, 6 Hum., 481; *Cornwell v. Cornwell*, 11 Hum., 488; *Townsend v. Townsend*, 4 Cold., 70; *Keith v. Ragland*, 1 Cold., 474; *Miller v. Miller*, 5 Heis., 723.

I do not think these cases apply here. The petitioner is a stranger in blood to the testator, and not a person *in interest* as entitled to probate in solemn form. Outside of a will he has no interest.

The judgment is reversed, and the cause remanded to the county court.

Hall v. The State.

JOHN HALL v. THE STATE.

CRIMINAL LAW. *Selling liquor without oath.* An oath "not to mix or adulterate with any poisonous substance whatever," is not a compliance with the statute requiring an oath "not to mix or adulterate with any substance whatever."

FROM SCOTT.

Appeal in error from the Circuit Court of Scott county. D. K. YOUNG, J.

HENDERSON & JOUROLMON for Hall.

ATTORNEY-GENERAL LEA for the State.

FREEMAN, J., delivered the opinion of the court.

Hall was convicted for selling liquor without having taken the oath prescribed by the act of 1860, ch. 81, Code, sec. 1733d.

This section makes it unlawful to sell liquors in this State, until the party shall first appear before the clerk of the county court where such liquors are to be sold, and take an oath "not to mix or adulterate with any substance whatever, the liquors offered for sale, and give bond, etc.

The defendant appears to have given the bond, and took and subscribed the following oath: "I, John Hall, do solemnly swear that I will not mix or adulterate with any poisonous substance whatever, any liquor that I may offer for sale, so help me, God."

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The court was requested to charge, that if the party had applied for license, paid his money, offering to comply with the law, and the license had been issued to him by the proper authority, the State could not rely on any verbal inaccuracy or omission in the oath prepared.

This the court declined, but charged that the oath taken was not a compliance with the act of 1860. In this he was literally correct. It seems to be a case where there has been an attempted compliance with the law, but by oversight, the language of the oath, as prescribed by the statute has not been given, nor has the party taken the oath thus prescribed. We know of no rule of law that will enable us to say the court was not correct in the charge given. The party obtaining the license is charged with the duty of taking the oath prescribed, and while it is customary, we take it for the clerk to prepare the form of the oath, it is not a duty imposed on him, and the oath would be equally valid if prepared by another, and sworn to before him. It is a case where executive clemency might well be extended, but the statute is imperative and we cannot dispense with its requirement, or allow an oath, not in the language required, to be the equivalent of that which is given by the law.

The judge trying the case seems to have felt that it was a hard case, and very properly suspended the execution of the sentence till further order of the court.

We can only affirm the judgment.

Doll v. Cooper.

R. M. DOLL *et al.* v. JOSEPH A. COOPER.

1. PLEADINGS AND PRACTICE. *Suit on attachment bond. Bankrupt. Assignee.* The bankrupt's right of action for wrongful suing out of an attachment, passes to the assignee in bankruptcy in so far as the action seeks compensation for injuring, detaining or converting the property attached, but it remains with the bankrupt in so far as the action seeks to recover compensation for injury to the bankrupt's business, reputation and credit, and vindictive damages for malicious suing out or abusive use of the attachment; but, though the bankrupt and assignee may maintain separate actions and recover, the assignee for the injury to the property, and the bankrupt for the personal tort, yet the aggregate recoveries cannot exceed the amount of the penalty where the action is on the attachment bond
2. SAME. *Same. Measure of damages.* The measure of damages for wrongful suing out of an attachment is, (1) loss by injuring, detaining or converting the property attached; (2) loss by injury to plaintiff's business, reputation and credit, as where plaintiff is thrown into bankruptcy by the attachment; (3) vindictive damages based on the falsity or *mala fides* of the claim, wanton abuse of process or express malice in suing out, levying or continuing the attachment; and these three elements of damage constitute the recovery in an action on the attachment bond as well as in the action at common law.
3. SAME. *Vindictive damages.* Vindictive damages cannot be recovered in an action for wrongful suing out of an attachment, where the declaration does not aver malice.

FROM KNOX.

Appeal in error from the Circuit Court of Knox county. S. A. RODGERS, J.

T. S. WEBB for Doll.

COLDWELL & SON for Cooper.

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FREEMAN, J., delivered the opinion of the court.

This is an action brought against Cooper as principal, the other two defendants as sureties on an attachment bond, executed on filing an attachment bill in the chancery court at Knoxville. The condition of the bond is the usual one as prescribed by our statutes, the liability depending on failure to prosecute the suit with effect, and the obligation is, in that event, to pay all damages that defendant may sustain from wrongfully suing out said attachment.

The declaration is substantially a suit for \$12,500 as damages for the breach of a bond, giving the date and description of the bond, setting out the condition fully, which is in case of failure to prosecute successfully, or the same should be dismissed, to pay all costs and damages that might be sustained by reason of wrongfully suing out the attachment.

The bond is averred to have been broken in this, that there was a failure to prosecute the suit or attachment, and the same was dismissed in March, 1877, by a decree of the court, having been issued in 1872. It is then averred that the said Cooper did illegally and wrongfully cause the said attachment to be issued out of said court, upon the execution of said bond, and "illegally and wrongfully caused said attachment to be levied upon the goods, wares and merchandise, books, notes and accounts, the property of the plaintiff, Curtis Cullen, and did wrongfully and illegally cause the possession of said goods, wares and merchandise, books, notes and accounts, so levied upon to be

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illegally and wrongfully withheld from the said Curtis Cullen from the 9th of January, 1872, to the date of bringing the suit, and the same he still illegally and wrongfully causes to be withheld from him, thereby *greatly damaging* him, the said Curtis Cullen, in his property, credit and reputation and business, to-wit, the sum of \$12,500."

Defendants filed a plea, which after setting out the attachment bond, denies the right of recovery, because, First, that the attachment was not illegally and wrongfully sued out, nor was the same illegally and wrongfully levied; nor were the goods, wares and merchandise, books and accounts illegally and wrongfully withheld, as the plaintiff hath alleged, but that said attachment was lawfully issued, and the goods, wares and merchandise were lawfully and rightfully levied on and retained without malice and upon probable cause, and tender an issue, to which there was a replication. On motion of plaintiff, so much of the plea as averred that the attachment was sued out and levied without malice and probable cause, was stricken out and the case went to the jury on the issues thus made. On the trial, the jury, under the instruction of the court, found a verdict for the defendants, from which an appeal in error is presented to this court.

Only so much of the charge is brought before us as raises the question in which the plaintiff claims there was error. It is as follows: That in this action plaintiff could only recover such damages as were the natural, proximate and legal result of suing out the attachment, and could not recover vindictive dam-

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ages, or damages done to the business, credit, or reputation of plaintiff.

Second. That if Cullen was adjudged a bankrupt, after the attachment, and before his right of action against Cooper for wrongfully suing out the attachment, the "attachment (the action we take it), passed to his assignee in bankruptcy, and Cullen could maintain this suit."

We notice the last branch of the charge first, because if his Honor is correct in that it is conclusive of the case, and we need not consider the other question, except so far as may be necessary, in order to get at the true nature of the present action.

It is conceded that the firm of Doll & Cullen were adjudged bankrupts, within a short time after the levy of this attachment, and an assignment regularly made of all their property and rights, as required by the bankrupt law, regularly made.

The question for adjudication is, did the right of action stated in the declaration in this case go to the assignee, as held by his Honor, or did it remain in Cullen, and he entitled to maintain it, notwithstanding his bankruptcy?

Section 5046 of Revised Statutes of the United States, in reference to the bankrupt's estate, is as follows: "All property conveyed by the bankrupt in fraud of his creditors, all right in equity, choses in action, patent rights, all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for *property or estate*, real or personal, and for any cause of action which he had

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against any person, arising *from contract*, or from the unlawful *taking* or *detention* or injury *to the property* of the bankrupts, and all his right of redeeming such property or estate, together with the like right, title, power and authority to sell, manage, dispose of, sue for, recover or defend the same, as the bankrupt might have had if no assignment had been made, shall vest in his assignee, subject to exemption in favor of exempt articles provided by law."

While the generality of this language would seem to include every right, of any kind, to which the bankrupt might be entitled, yet we think its true exposition is given by the Supreme Court of Wisconsin, in the case of *Noonan v. Orton*, vol. 34, p. 264. The court says: "Taking the whole language together, it refers to property and rights of recovery incident to and growing out of wrongs to property, where, though the action is in form of tort, yet the damages are to be measured by the *value* of the property taken, as in trover, or any action where such property is sought to be recovered, together with incidental damages for its detention, as for direct injury done to property, and the like. The true idea is, that when recovery is to result from the property and stand in its place, or be given as compensation for it, or injury to it, then all such rights were intended to pass to the assignee. But as said by the same court, page 365, "That there are some rights of action which do not pass to the assignee, may also be inferred from the provision of section 16, which authorizes the assignee to prosecute in his own name actions pending in the

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name of the bankrupt, for the recovery of a debt, or other thing, which might, or *ought* to *pass* to the assignee," clearly implying that there are rights of action which do not pass to such assignee. In this case it was held that an action for malicious prosecution, or for malicious abuse of legal process, was an action for a personal injury, although special damages were claimed in the declaration for loss to plaintiff's business resulting from the wrong in aggravation of the recovery sought.

The principle underlying this opinion is, that all right of action appertaining to or growing out of property, or injuries to such property, thus lessening its value as an asset in the hands of the assignee, pass to such assignee, but a right to sue for a pure tort to the person, or personal wrong, or to his personal relations, does not pass.

This is based in sound principle and sustained by the general policy of the bankrupt law, which is that all the property and rights of the debtor, which would be assets in the hands of his personal representative, if he were dead, shall pass to his assignee to be administered by him, and distributed *pro rata* among his creditors. It would hardly be contended, that a right to sue for slanderous words, or for *crim. con.* would pass to such an assignee. It has been held in England, under a similar statute, that a right of action for trespass *quare clausem fregit* did not pass to the assignee. The English statute is even more extensive than that of the United States, for it gives to the assignee all rights of action accruing up to the time

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of his receiving his certificate of discharge. The court says in the case cited (*Rogers v. Spencer*, 13 Mer. & Wilby, 571), that, the right of action did not pass, "as the object of the statute is manifestly to benefit creditors by making all the pecuniary means and property of the bankrupt available to their payment. In furtherance of this view, it has been construed liberally, so as to pass not only what in strictness may be called the property and debts of the bankrupt, but also the rights of action to which he was entitled for the purpose of recovering in specie, real or personal property, or *damages* in *respect* to that which has been unlawfully diminished in value, withheld or taken from him. But causes of action not falling within this description, arising out of a wrong personal to the bankrupt, and for which he would be entitled to remedy, whether his property were diminished or not, are clearly not within the letter, and have never been held to be within the spirit of these enactments, even in cases where injuries of this kind may have been accompanied or followed by loss of property, and to this class we think the action of *trespass quare fregit* must be considered to belong."

We understand the cases of *Comegys v. Vasse*, 1 Peters, 193, and *Erwin v. United States*, 7 Otto, 396, to accord with this view. The first was a case of an unlawful capture of property, and the right of recovery was clearly the value of the property, and this stood in the place of the property, and the amount measured by such value. The other was a right to recover compensation for the possession and use, or ap-

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appropriation of tangible property, and stands on the same principle. It was a claim against the government for cotton destroyed by the army during the war. Both rights were held to pass to the assignee, and we think correctly, the recovery but representing the property at the time of the wrongful taking.

The question for solution in this case, is this an action to recover property, or damages for an injury done to property, by which its value was lessened, or will the sum sought to be recovered, represent property of which the plaintiff had been deprived, or any value in such property? If not, then on the principle given, the right does not pass to the assignee. In other words, if property, or its value, is not the measure of recovery, or any damages done to such property, the right is in Cullen, if it is, then the right passed from him to the assignee. If the damages is to him, as an individual, affecting other rights and having other elements than property or its value, or damages done to it, then plaintiff should be entitled to the recovery he seeks.

We do not say, that an action for the recovery of the "goods, wares and merchandise, books, notes and accounts," mentioned in the declaration, might not lie, yet in the nature of the case in such a proceeding as the one by attachment in chancery under our practice, such a liability is the least likely to arise, if it ever does in practice, of any other provided for by the bond given. The property is not in the custody of the complainant in such a suit, but in the custody of the law. The sheriff holds it, subject to be replevied by defendant,

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before sale or return of the process into court, after return the clerk takes such a bond if tendered: Code, secs. 3510, 3511. It can only be damaged so as to give a cause of action to the defendant by the negligence or wrong of the sheriff while he holds it, and this would be a breach of official duty, for which he and his sureties would be liable on his official bond. At the termination of the suit, it would be ordered, if not replevied, to be restored to the possession of defendant, if decreed against complainant, or appropriated to the decree, if found liable, and so there is no need to resort to the bond by separate action, as this is in order to obtain the property.

In the light of our own decisions let us see what are the leading elements of the damages to be recovered in such a suit. In *Smith v. Story*, 4 Hum., 172-3, which was an action on the case, for wrongfully and oppressively suing out an attachment, the court, after saying, the statute gave no enumeration of the grounds of the action, but merely requires a bond to secure such damages as may be recovered, gives some of the elements of damages as follows: "For the grounds and principles upon which such damages shall or may be received, the jury are to look to the common law. Is there an abuse of the process of the court? Is the claim of the plaintiff false? Was there *mala fides*? Were fraud and oppression the object of the suit, or of resort to the process? Such are the facts, or some of them; such the motives which must be attached to the conduct of the plaintiff in the attachment suit." The principles of the common

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law, therefore, on the subject of action for malicious suits must apply, modified by the nature of the case. The court, we add, had previously indicated the opinion, that all these elements of damage were included in and covered by the bond, and might be recovered in an action on such bond.

In *Smith v. Eakin*, 2 Sneed, 461, which was an action on the bond, it was so held, the court saying, "We hold, in such action there may be a recovery not only for such damages as are properly recoverable in the common law action, but likewise for other damages, upon grounds contemplated by the statute, and not embraced by the principles governing the action on the case. We are unable to perceive any sound reason for holding the bond to be merely a security for the damages to lie recovered in an action on the case." The terms "wrongfully suing out the attachment" are as properly applicable to a case where the process has been resorted to, in the absence of sufficient legal cause, without reference to the intent as to the case where it has been sued out from motives of malice and oppression, and the consequences of the wrongful act may be no less injurious to the defendant in the attachment in the one case than in the other": *Id.* 462. The court then adds, "That the measure of damages would be confined to the actual injury sustained in the one, as in the other, that is when maliciously sued out, *vindictive* damages might be allowed. All such damages are the natural proximate result of the wrongful act, and secured and covered by the bond."

These cases settle the law to be, that all such

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damages as might be recovered in an action on the case at common law, as well as *vindictive* damages, in case the wrongful suing out the attachment, was also malicious, are recoverable in the action on the bond. In the first case, where no malice is averred, the actual injury sustained is to be looked to, in the other, punitive damages may be given, over and above this.

But when we look at some of the elements, or all of them, found in the communication given by the court (4 Hum., 172), it is clear, they are not for property, nor damages to property as such—but based on the conduct and motives of the complainant. Was there an abuse of process—the claim false—no probable cause to resort to the process—*mala fides*? We add, as the recovery is to be had on the same principle as in the common law action for malicious suits, modified by the nature of the case—the modification found in this, and the like case would be injury to a merchant—his reputation—credit—as a business man, and the wrong done by the wreck of his business, caused by his being thrown into bankruptcy on a claim shown to have been false and unfounded—with perhaps other elements, such as the costs of the wrongful suits, etc.

Now if these be the elements of damage, and the nature of the case before us, it follows, the action did not pass to the assignee, but remained to the plaintiff. The gravamen of damages averred in the declaration is, that by illegally and wrongfully suing out the attachment, and wrongfully taking possession of his goods, books, notes and accounts, he was, to use the language

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of the declaration, "greatly damaged in his property, estate, credit, reputation and business."

The suit is not for the property taken, nor for notes, books and accounts, as the character of the property is not stated, nor value, nor amount of notes and accounts, nor any description of the same, so as to be the basis of such recovery. These are but stated as inducement to show the means by which the injury to plaintiff in business, estate, credit and reputation was done.

So it was held by the Supreme Court of Wisconsin in *Noonan v. Orton*, 34th vol. 259, and that it was a suit for personal injury, although special damage or loss to plaintiff's business, resulting from such wrong was alleged in aggravation of damages.

Construing this declaration as not entitling the party to any recovery for the property, or damages for injury to its, nor for its detention from plaintiff, as we do, and confining plaintiff to a recovery for the wrongs done of the kind indicated, we have no question but that the action was for a personal wrong—a pure tort, and not for property, and therefore did not pass to the assignee. This record shows there is no cause of action for loss or injury done to the property, but the same has been regularly appropriated in the bankrupt proceeding to the payment of his debts, and thus he has had, in fact, the benefit of it.

An objection is suggested, that the bond giving a right of action for property or damage to such property, when the proper case was made, and such a right being one that passes to the assignee, that to

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allow the plaintiff to recover in such a case for the personal wrong, would be to split the cause of action, and there be two different rights of suit on the same bond.

Several answers may be given to this, First, we think the objection cuts both ways, and would, if pressed to its legitimate conclusion, as well defeat the assignee, as plaintiff. Why not say, that if he sued on the bond for an injury to the property, or for the property itself, that this would be to split the right of action given by our law on the bond, and therefore deny him any remedy? In that view, the same objection being held tenable when the plaintiff sues on the bond for his personal wrongs, no recovery could be had by either party. But why should the fact that a party who has received no damage, in this case, the assignee, and has no cause of action, and has brought none, because he has the property, be made the means of defeating a right of action for an apparently gross wrong, because forsooth, if he had been injured, he might have sued. Why give him a right, that has not been affected, and thereby defeat a right of recovery in the other party who has been injured? We are unable to see the force of this objection, that seems to be purely technical, and which defeats a right on such a technicality.

Why not look at the real nature of the case, and hold, as the bond covers damages both personal, and to property, that the right to the first goes to the party injured, and the right to the other goes to the party who might have been, had he been deprived of

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the property? The defendants cannot be made liable above the amount of their bond, and the fact, that by operation of law, and probably, if not certainly by wrongfully issuing the attachment, these rights have been severed, and exist in several individuals, ought not to defeat the one who has been injured, or rather solely injured.

The opposite technical view we think too narrow, and stands on grounds of logic, akin to that which was at an early day familiar, but which is now being superseded by more liberal modern reasoning. It would be sustained by an old edict of Anglo Saxon law, we believe, which laid it down, "when a house was broken, and property stolen held by the house-holder, as bailee, that the real owner should look to the bailee alone for compensation, and the bailee sue the thief, because, as it says, we cannot raise two claims out of one *cause*": See Common Law, by Holmes, Note 1, page 166. The logic is neat and clear, but the justice and right of the case is effectually ignored, by the conclusion.

This bond is given to three or four other defendants, is a joint obligation to them with the plaintiff. They were not connected with him in business. Suppose each had chosen to sue on the bond, would it be said, this would be splitting the cause of action? The injuries could not have been joint to them, as they were different firms and parties, who had no connection with defendant. Could not each have sued on the bond for his individual wrong? We take it this could not be doubted.

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So in the case of an administration bond, each creditor injured by the wrong of the representative might sue, and the right of one would not interfere with that of another. This furnishes an analogous case, as we think, precisely in point, and the principle is one well known in our practice.

The parties gave their obligation while the bankrupt law was in force, and may be held to have contracted in view of the possible contingency which has happened, and therefore cannot complain, that by possibility they might have been subjected to two suits, in the event of the bankruptcy of the defendant to the chancery suit. For these reasons, we think there is nothing in this objection.

No malice being alleged in the declaration as it stands, his Honor was right in charging, under our decisions, that vindictive damages could not be recovered, under the pleadings.

The result is, the judgment must be reversed, and the case remanded for a new trial.

COOPER, J., dissents.

HAYS v. Worsham.

HAYS *et al.* v. WORSHAM *et al.*

SALE OF LAND. *Parol. Election by purchaser.* A tract of land having been sold, under an administrator's bill, to pay debts subject to redemption, one of the heirs, for himself and as agent of the other heirs, made a parol sale of a part of the land to a third person for more than the amount bid at the judicial sale, and the purchaser paid the bidder his debt, and took an assignment of his interest for the benefit of the heirs, and was put in possession of the land by the heirs under the parol contract, but afterwards, and after the time of redemption had expired, set up title to the whole tract under the assignment. *Held*, upon bill filed by the heirs, that the parol sale was void at the election of the purchaser, but that the heirs were entitled to recover possession of the land and to have an account as upon rescission, or as between mortgagors and mortgagees, unless the purchaser, under the offer of the bill, elected to take the land upon the terms of the parol contract, in which event the decree would be for the specific enforcement of the contract.

FROM GREENE.

Appeal from the Chancery Court at Greeneville.

H. C. SMITH, Ch.

R. M. MCKEE for complainants.

H. H. INGERSOLL for defendants.

COOPER, J., delivered the opinion of the court.

The four complainants are the children and heirs of George Hays, deceased, one of them, Wm. A. Hays, being the administrator of his father's estate. They inherited from their father, and lived upon a tract of land of four hundred and eighty acres. Under a bill

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filed by the administrator, one hundred and fifty acres of the west end of this tract was sold for the purpose of paying debts of the estate, and David Sevier became the purchaser at \$350. The sale was confirmed by the court in February 1877, and title vested in him, subject to the right of the heirs to redeem. The heirs were in possession, the complainant, Wm. A. Hays, living on the one hundred and fifty acres. In this situation of affairs, in February, 1878, Wm. A. Hays, acting for himself and the other heirs, made a parol sale of one hundred acres of the one hundred and fifty to the defendant, A. R. Worsham, for \$600; the said Worsham, who then lived in Virginia, expecting to sell his farm in that State, and remove to the place thus bought. Between that time, and the month of October, he wrote several letters to Wm. A. Hays expressing his determination to carry out the contract, and explaining his delay in doing so by the difficulty of disposing of his property in Virginia. In the month of September, about the 25th of that month, Worsham came to Tennessee, and stopped at the house of David Sevier, which was on the way to the Hays place, and paid Sevier the amount of his bid on the land with interest, taking an assignment of Sevier's certificate of purchase. On October 23, 1878, he moved his family into the house on the tract of one hundred and fifty acres, Hays moving out to give him possession. Worsham says he took possession as the assignee of Sevier, claiming the whole one hundred and fifty acres. Hays says that he took possession under the verbal purchase. Certain it is, that he afterwards set up a claim to the

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whole one hundred and fifty acres. This bill was filed September 16, 1879, by the heirs against Worsham and Sevier, for relief upon the foregoing facts. The chancellor granted relief and Worsham appealed.

The defense of Worsham, made first by demurrer and afterwards by answer, was that the parol sale, the terms of which he admits, was void by the statute of frauds. He says he did agree to buy the one hundred acres at \$600, and that they were definitely designated. But he relies expressly in his answer upon the statute of frauds, and under the recent decisions of this court the contract is void, and cannot be enforced, although he may have made the payment to Sevier and gone into possession under it, and although the complainants may be ready and willing to make title in accordance with its terms: *Biggs v. Johnson*, cited in *Winters v. Elliott*, 1 Lea, 676. The earlier,* and I am myself inclined to think the better rulings were different: *Sneed v. Bradley*, 4 Sneed, 301; *Hilton v. Duncan*, 1 Cold., 314; *Bloomstein v. Clees*, 3 Tenn. Ch., 439, and cases cited.

Conceding that the complainants were entitled to relief upon the contract of parol purchase, have they any ground of equity upon the facts stated in the pleadings, and established by the proof? At the time of the filing of the bill the legal title to the land was in Sevier, the defendant, Worsham, having only a certificate of sale, by virtue of which, the sale having been confirmed, the legal title might be procured through the court or from Sevier. The proof shows that the defendant, Worsham, afterwards, pending the suit, pro-

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cured a deed from the clerk, but it does not appear that there was any order of court authorizing the clerk to make it. If, then, the defendant, Worsham, went into possession under his verbal purchase, as we think the proof shows he did, the complainants would be entitled to recover possession, subject to the usual account upon the election of either party to treat the sale as void.

The complainants are also entitled to relief upon another ground, reaching substantially the same result. Shortly after Worsham had made the verbal contract of purchase, he wrote a letter from his home in Virginia, to David Sevier, which gives us a clue to his subsequent contract. He writes, under date of February 18, 1878: "I take this method to inform you that I have bought one hundred acres of land of Wm. A. Hays, of Greene county, Tennessee. He told me that you had a lien on the land of about \$300. I want you to write to me all about it, as I am going to try to pay all the money down, which is \$600. When I go down to pay him the money, I am coming past your house to see you, and lift your lien, so I won't have any trouble over it." It appears in the testimony, that Worsham entertained a fear, which seems to have had some foundation, that if the purchase money was paid directly to Hays, the latter would use it otherwise than in lifting the liens on the land bought, and he intended to be secure in this regard. Sevier testifies that when Worsham came to his house he expressed some such fear, and after he received the assignment of Sevier's bid he said he

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would now make him do right. Sevier further testifies that it was upon the representations contained in Worsham's letter that he proposed to assign to him his bid. Worsham himself testifies that he entered into the contract of purchase in good faith, and it is very obvious that he made the payment to Sevier in pursuance of that contract in order to secure the application of the purchase money to the satisfaction of liens existing on the land. With the same object, after he went into possession of the land, he paid to one Crawford, who had, as he was informed, a debt against complainant's father, which was a lien on the land, \$86.50. He obtained and took possession of the land under his purchase, and the use made by him of the assignment of Sevier's bid to set up another title was manifestly an after-thought. It does not appear, except from his own testimony, that he notified Hays of his change of purpose until after the time of redemption had run. The payment to Crawford was made on the 7th of December, 1878, and the time of redemption ran out on the 9th of February, 1879. Under these circumstances, we are of opinion that at the time that Worsham took an assignment of the interest of Sevier in the land, he did so not as a purchaser, but for the benefit of the heirs of the estate, and that he would hold the interest thus acquired as a security for the money paid. The subsequent payment to Crawford would stand on the same footing. It would operate as a fraud upon the heirs, to permit him to change his ground after the time for redemption had expired: *Haywood v. Ensley*, 8 Hum.,

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460; *Gwinn v. Locke*, 1 Head, 113; *Martin v. Lincoln*, 4 Lea, 344. In this aspect of the case, the account would be on the basis of mortgagors and mortgagee.

The complainants have, by their bill, tendered a performance of the contract of sale, and the defendant, Worsham may, if he now elect to do so, have a specific execution of the parol contract of sale, in which event the chancellor's decree will be affirmed with costs. Otherwise, the complainants may elect to take a decree on either of the other grounds. Worsham will pay the entire costs of the cause in this court and the court below.

JAMES M. COOPER *et al.* v. A. S. LYONS *et al.*

1. CHANCERY PLEADINGS AND PRACTICE. *Appeal by one of several complainants.* An appeal by one of several creditors in a bill filed by them against an administrator, for a recovery of their several debts and an account of the personal assets of an estate, will not bring the case up as to another creditor whose claim has been allowed, so as to enable the appellees to call in question the validity of the judgment rendered in favor of the latter creditor. And, *quere*, whether the creditor who does not appeal can claim the benefit of a decree of this court, the effect of which would be to increase the assets liable to debts.

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2. *LIMITATION. Statute of. Administrator. Request for delay.* A sufficient request for delay by an administrator will not prevent the running of the limitation of seven years (Code, 2786), in favor of the estates of decedents. That statute not only bars the remedy, but extinguishes the right, and need not be pleaded.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville. H. C. SMITH, Ch.

W. P. GILLENWATERS and SPEARS & SPEARS for complainants.

KYLE & McDERMOTT for defendants.

COOPER, J., delivered the opinion of the court.

George M. Lyons died in June or July, 1867, and at the August term of the county court following, the defendant, W. H. Watterson, was appointed and qualified as administrator of the estate. On August 28, 1869, W. H. Watterson, as administrator of the intestate, filed his bill against A. S. Lyons and G. G. Lyons, the only heirs and distributees, to have the administration conducted in the chancery court, and to be authorized to sell land, which he, as administrator, had been compelled to purchase to save debts due the estate. No creditor of the intestate was ever made a party to this bill. On October 12, 1878, A. S. and G. G. Lyons filed a bill against Watterson, as administrator, for an account of his administration, and obtained an injunction enjoining him from further acting as administrator, and a further order appointing G. G.

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Lyons receiver, to take possession of and collect the assets of the estate, and he qualified as such receiver by giving bond with security for the faithful discharge of his duties. On September 26, 1879, the present bill was filed by James M. Cooper, J. B. Galbraith and Thomas C. Miller administrators claiming to be creditors of the intestate, George M. Lyons, by debts created by him in his life-time, against the administrator and heirs, and against A. S. Lyons, as receiver, and the sureties on his bond. The bill sought to recover judgment on the several demands of the complainants against the administrator, to subject realty descended to the heirs to the satisfaction of the demands, and to hold the receiver liable for alleged losses to the estate occasioned by his management as receiver. Watterson allowed the bill to be taken for confessed against him. The other defendants answered, relying upon the various statutes of limitations as barring the right of action of the complainants. Miller, one of the complainants, dismissed the bill so far as he was concerned before the hearing. The other two complainants also dismissed the bill as to the defendants A. S. and G. G. Lyons as heirs, abandoning all claim to reach realty descended. On final hearing, the chancellor dismissed the bill so far as the claimant Galbraith was concerned, but gave complainant Cooper a decree for his debt against Watterson, as administrator, to be satisfied out of the personal assets, and ordered an account of the administration. He refused any relief against A. S. Lyons as receiver. Galbraith alone appealed.

The complainant Cooper claimed to be a creditor

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of the estate by a note of the intestate under seal, dated May 12, 1857, and payable on the first of the following September. The complainant Galbraith claimed to be the holder of the intestate's note, dated December 29, 1858, payable one day thereafter. No suit had ever been brought on either of these notes before the filing of the present bill. After the dismissal of the bill as to the heirs, it became simply an action of each complainant on his demand against the administrator, and, as an incident to the recovery of judgment, for an account of the personal assets in the hands of the administrator and receiver. No objection was taken in the pleadings of the defendants to the jurisdiction of the court, and probably no defense could have been made on this ground since the act of 1877, extending the jurisdiction of the chancery court on legal causes of action.

The demands of the complainants were unconnected with each other, upon which separate suits might have been brought against the administrator for the recovery of judgment. Each complainant stands upon his own right of action. And this is so even to the incidental matter of account, as much so as if the bill had been filed by one of them for himself and other creditors, and the other had come in by petition, and made himself a party. Under the provisions of the Code, secs. 3155, 3159, if a decree adjudges independent rights it will remain in force as to those parties who do not appeal. The appeal of Galbraith does not, therefore, bring up the case as to Cooper, so far as the adjudication of Cooper's debt is concerned.

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Whether Cooper can claim the benefit of any decree of this court, upon the appeal of his co-complainant, against the receiver and his sureties, if the chancellor's decree should be modified in this regard, need not now be determined.

Treating the bill as an action by the complainant Galbraith for the recovery of a judgment on his note against the administrator Watterson, the time of the bar of the statutes of two, six and seven years has run out. The bill seeks to avoid the result by averring that the administrator "has made request for delay and promises to pay which prevent the bar of the statutes." And there is proof tending to show such request, and repeated promises by the administrator to pay when he could get the money out of the Walters or the Phillips lands. Whether the request and promise were sufficient to save the bar of the statute of two years, and the *pro-confesso* order against the administrator would save the bar of the statute of six years, it is unnecessary to enquire. A sufficient request for delay will not stop the running of the statute for seven years: *Loyd v. Loyd*, 9 Baxt., 406. The statute (Code, sec. 2786) is a positive prescription, which not only affects the remedy, but extinguishes the right. It protects the estate of the decedent against all creditors of the decedent, whether the estate be in the hands of the personal representative, the heir or the distributees: *Peck v. Wheaton*, M. & Y., 353; *Stone v. Sanders*, 1 Head, 248; *Rogers v. Elter*, 8 Baxt., 13. Even the State is bound by the statute, because, as well said by Hammond, U. S. Dist.

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J., in *Pulliam v. Pulliam*, 10 Fed. Rep., 76, it is something more than a statute of limitations, it constitutes a rule of property: *State v. Crutcher*, 2 Swan, 505. Such a statute, all of our authorities agree, need not be pleaded. The question is not one of remedy but of title: *Kegler v. Miles*, M. & Y., 426; *Bomar v. Hagler*, 7 Lea, 85-89.

Affirm the decree as to complainant Galbraith with costs.

A. N. SHOWN, Adm'r, v. ANDREW McMACKIN.

1. CHANCERY PLEADINGS AND PRACTICE. *Bill to have administrator appointed.* Under the provisions of the Code, sec. 2209, *et seq.*, a bill may be filed by the personal representative of one of the next of kin of a deceased person against another one of the next of kin having assets of the estate of the deceased in his hands, to have an administrator appointed, and for the collection of the fund.
2. ADMINISTRATION. *Granted upon presumption of death.* There being no statute in this State providing that after an absence of a given time without being heard from, administration may be granted of the estate of an absent person, the courts should be cautious in acting upon the presumption of death from lapse of time, and should, as a general rule, require diligent inquiry at the place where the party was last heard from.
3. SAME. *Same. Presumption as to time of death.* Where a person when last heard from expressed a possible intention of returning home in a reasonable time, and has not been heard from for over a quarter of a century, it may be presumed as a fact that he died at the end of seven years, and without issue, he having been unmarried when last heard from.

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4. CHANCERY PLEADINGS AND PRACTICE. *Answer as evidence.* If the facts stated in an answer in avoidance are a direct and proper reply to an express charge or interrogatory of the bill, the answer is evidence of these facts.

FROM GREENE.

Appeal from the Chancery Court at Greeneville,
H. C. SMITH, Ch.

H. H. INGERSOLL for complainant.

R. M. McKEE and ARMITAGE for defendant.

COOPER, J., delivered the opinion of the court.

In 1850, Andrew and John P. McMackin, young men and brothers, left their home in Greene county, and went to California. In the fall of 1853, Andrew returned home with \$1,000 of his brother's money, John directing him to loan a part of it to his father, and to keep the residue for his brother. The father died in a year or two, and, his estate being insolvent, Andrew received back \$350 of \$500 loaned. John has never returned. The brothers had one sister, Martha J. Harrison, a married woman, who died in April, 1861, leaving children. The complainant qualified as the administrator of her estate in July, 1879, and filed this bill, on October 27th of that year, to have an administrator appointed on the estate of John, and to collect from Andrew the money due his brother.

The bill states that John P. McMackin expected to return home in a year or two after Andrew, but had never returned, nor sent any word or message to his friends. It says that he is not known to have

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been alive since 1853, and avers that he is dead, that he died before his sister, that he died intestate, unmarried, and without issue, leaving his brother Andrew and his sister Martha J., his only heirs and next of kin. It is further averred that no one will apply, nor can be found to administer on his estate, and the court is asked to appoint an administrator under the Code, sec. 2209. The chancellor appointed an administrator as prayed, and, on final hearing, granted the relief sought, and defendant appealed.

The defendant demurred to the bill. One ground of demurrer is, that it does not appear from the bill that complainant can have any demand either against defendant or his brother, because it is not stated that complainant's intestate died before or after her brother. But this assignment is based on a mistake of fact, for the bill plainly avers that John is dead, and that he died before his sister. Whether these averments will be sustained merely by the presumption of his death arising from lapse of time, we may infer, but cannot know as matter of law from the allegations of the bill. Another ground of demurrer is, that administration cannot be granted because it is not shown that John had any estate in this chancery division. But the bill plainly avers that the money in Andrew's hands belongs to John's estate. The remaining cause of demurrer is, that the defendant is only liable to the estate of John, not to the complainant as distributee; that the statute does not contemplate the appointment of an administrator to be aggressive against other defendants, but for defense. But the statute authorizes

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an administrator to be appointed in the case provided for by sec. 2209, "when six months have elapsed from the death, and no person will apply or can be procured to administer on the estate," upon the application of the next of kin or any creditor of the deceased, (sec. 2210), that the administrator shall be a party to the proceedings under all the responsibilities of a receiver, (secs. 2216, 2218), and that the administration shall be conducted in the same manner as the administration of an insolvent estate: Sec. 2219. The jurisdiction is purely statutory, and the bill should on its face make out a proper case: *Bruce v. Bruce*, 11 Heis., 760; *Evans v. Evans*, 2 Cold., 143; *Barry v. Frazier*, 10 Heis., 207; *Branner v. Branner*, 1 Lea, 106. The administrator, if appointed, is, however, a general administrator: *Todd v. Wright*, 12 Heis., 444. The statute is, therefore, comprehensive within the limits of the special jurisdiction conferred. It contemplates, in the cases provided for, a full administration, and the settlement of all matters touching the estate in which the creditor or distributee may be interested. No reason occurs, nor has any been suggested, why the administrator may not be "aggressive" in the particular case if the circumstances require it, as he certainly must be in the collection of the assets of the estate. And such aggressiveness would seem to be eminently proper where the defendant is himself the principal debtor of the estate, and entitled to administer, and fails to apply for letters.

There is more difficulty on the merits. No averment is made in the bill, nor is any proof introduced

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to show that any inquiry has been actively instituted for the purpose of ascertaining whether John P. McMackin is actually dead or alive. The sole ground relied on is the presumption arising from lapse of time, and the absence of all information from him, that he is dead. We have no statute providing that after an absence for a given time a person's estate may be administered on as if he were dead, or that death shall be presumed for the purposes of administration after a given time. And administration on the estate of a living person is, as we have held upon full consideration, absolutely void: *D'Arusment v. Jones*, 4 Lea, 251. Obviously, the courts should be cautious in acting upon the presumption alone, and, as the general rule, diligent inquiry at the place where the party was last heard from should be required: *Puckett v. State*, 1 Sneed, 356; *McCartee v. Camel*, 1 Barb. Ch., 455.

In the present case the right of the complainant's intestate, as a distributee of her brother's estate, depends upon the fact that he died after their father, and before the sister. For the father would have been sole distributee, if the son had died intestate before him, and the sister would not be a distributee if the brother died after she did. The complainant has no right to file this bill under the statute except as the representative of one of the next of kin of John at the time of his death. The question is, therefore, whether the facts raise a sufficient presumption of death within the specified time.

If the case rested alone upon the bill and answer, the latter being under oath as called for, the complain-

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ant must fail. For the defendant says in his answer that he received a letter from his brother John about five years after his return home, in which John said nothing about coming back, and that about the year 1868 he received information that John was then in California, and quite well. The bill avers that John has not "sent word or message to his friends at home." The answer above is a statement of facts in avoidance which is a direct reply to the charge. The rule in this State is that if the facts stated in discharge or avoidance in an answer are a direct and proper reply to an express charge or interrogatory of the bill, the answer is evidence of those facts. And *this*, whether the response be by a direct denial or by a statement of facts by way of avoidance: *Hopkins v. Spurlock*, 2 Heis., 152; *Woodard v. Robertson*, 3 Leg. Rep., 231; *Beech v. Haynes*, 1 Tenn. Ch., 569. Unless these statements are disproved by the record, they must prevail.

The answer, it will be noticed, gives no details of the circumstances attending the receipt of the letter, of its contents, or of the place at which it purported to be written. The answer elsewhere states that John could neither read nor write. The allusion to the information received in 1868 is still more vague. The defendant does not say that these facts were communicated to John's family or friends, nor does he give his deposition in the cause. Three witnesses are introduced by the complainant to prove Andrew's statements on this subject outside of the record. One witness testifies that he heard Andrew say, that old Mr. Philips told him that he, Philips, had received a

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letter from his son about the commencement of the war that John was living; and that he had heard Andrew say recently that in 1866, or 1868, he got information of his brother through Josiah Guinn. Another witness says that two days before his deposition was taken defendant told him that he had not heard from his brother in fifteen years, and he had then received information in a roundabout way from one of the Philipsses. The complainant testifies that when he was getting up the facts with a view to this bill, he had a conversation with the defendant, in which the latter told him that he heard from his brother just before the war, in a roundabout way, and had not heard from him since; that he supposed his brother had gone into the army and been killed. These conflicting statements tend to throw discredit on the averments of the answer, and to require some explanation from the defendant. But he neither comes forward himself, nor introduces any testimony that any other person had received information from his brother, or in relation to him. So far as appears, no person had heard from him, unless it be defendant, and he does not say that he communicated his information to any of the family. The defendant says in his answer that his brother said to him, when he left him in California, that he might come home in a year or two, or he might not. This language implies at least an expectation that he might come home in a few years, If, in fact, he has not communicated with his family, or been heard from for over a quarter of a century, the presumption of death would fairly arise. And the

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circumstances would justify a finding that he died within the first seven years. Some of the authorities hold that when the presumption attaches, it only implies that the party is dead, but not that he died at any particular time during the period: *Doe v. Nepean*, 5 B. & Ad., 86; 2 M. & W., 894. Other authorities seem to hold that the presumption, as well as the fact of death attaches to the time, and fixes the date of the death at the end of the seventh year: *Hickman v. Upsall*, 13 English Rep., 676; *Clarke v. Canfield*, 2 McCarter Eq., 119. But all the authorities agree that the time of death is to be inferred by the court or jury from the circumstances: *Rust v. Baker*, 8 Sim., 443; *Spencer v. Roper*, 13 Ire., 333. And if the person was unmarried when he went abroad and was last heard from, the presumption of his death carries with it the presumption that he died without issue: *Rowe v. Hasland*, 1 W. Bl., 404; *Doe v. Griffin*, 15 East, 293.

Under the circumstances of this case, the reasonable presumption would be that the party died at the expiration of the seven years from the summer or fall of 1853, which would be before the death of the complainant's intestate. He was unmarried when last heard from, and must be presumed to have died without issue.

The chancellor has arrived at the proper conclusion as to the amount with which the defendant should be charged. But it clearly appears that there are no creditors of the estate, and therefore the defendant is entitled to retain one-half of the fund as distributee. The decree will be for the other half, with the costs of the cause.

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RAGAN & BUFFET v. H. M. AIKEN.

1. RAILROAD. *Franchises may be assigned. When.* The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights, and may be assigned; but the franchise to form or be a corporation and act in a corporate capacity is legislative, and not the subject of sale or transfer except by some positive provision of statute law pointing out the mode of transfer.
2. SAME. *Chancery pleadings and practice.* The bill alleged that a particular railroad, with all its property, effects and franchises, was sold under the proceeding by the State against delinquent railroads, and subsequently re-sold by the purchaser to an individual named, and by him to the defendant, who had continued to operate the road under the charter of the original corporation, and had charged and received from the complainants excessive freight. *Held*, upon demurrer, that the defendant was not the corporation, and that the bill was properly filed against him as an individual.
3. SAME. *Rate for transportation.* By statute the railroad companies of this State are given the exclusive privilege to carry freight and passengers over their respective roads, "provided that the charge for transportation or conveyance shall not exceed 35 cents per 100 pounds on heavy articles, and 10 cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger." *Held*, that the intention of the Legislature was to confer upon each company the right to charge, as a common carrier, for freight and passengers carried over its road, or any part of it; that the intent was not to proportion the charges by any unit of distance, but to fix a maximum beyond which the company could not go, and to leave the tariff of charges, within that limit, to the company, subject to the rule of the common law that the charges should be reasonable, and to the regulating power of the courts and the Legislature.
4. SAME. *Common carrier. Rates of freight.* A common carrier is bound to carry at equal rates for all customers in like condition, but may discriminate in rates of freight between customers not in like condition, if the discrimination be fair and reasonable, and not inconsistent with the public interest.

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5. SAME. *Same. May discriminate in rates of freight. When.* A common carrier may discriminate in favor of persons living at a distance from the end of the route, where the object is to secure freight which would otherwise reach its destination by a different route, and other customers not in like condition will have no right of action because of the discrimination, if the charges made against them are reasonable.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville. H. C. SMITH, Ch.

SHIELDS & SHIELDS, KYLE & McDERMOTT and J. B. HEISKELL for complainants.

W. P. GILLENWATERS and A. D. HUFFMASTER for defendant.

COOPER, J., delivered the opinion of the court.

The chancellor sustained a demurrer to this bill, and the complainants appealed.

On February 27, 1852, the General Assembly of the State passed an act to charter the Rogersville & Jefferson Railroad Company as a corporation. By the ninth section of the act, it was provided that said railroad company should be governed by the provisions of the Nashville & Chattanooga Railroad charter, and should have the same rights and privileges, and be under the same penalties and restrictions as said company. By the fourteenth section of the act incorporating the Nashville & Chattanooga Railroad Company, it is provided that the charges for transportation on said road shall not exceed thirty-five (35) cents per

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hundred pounds on heavy articles, and ten (10) cents per cubic foot on articles of measurement, for every hundred miles, and five' (5) cents a mile for every passenger.

The Rogersville & Jefferson Railroad Company was organized under its charter, and built a road from Rogersville to a point on the line of the East Tennessee, Virginia & Georgia Railroad, a distance of fifteen miles, which it equipped and operated for several years by carrying freights and passengers as a common carrier. It had, however, received State aid under the act of February 11, 1852, and subsequent acts amendatory thereof, whereby a statutory lien or mortgage was created in favor of the State upon the entire road, stock, equipments, superstructure, franchises and property of the company, as security for the bonds of the State issued to the company, and the interest thereon. The company having failed to meet its obligations under the contract with the State, such proceedings were taken by the State against the company that, by order of court, the road, with all its property, effects and franchises, was, on the 20th of March, 1872, sold to the East Tennessee, Virginia & Georgia Railroad Company, and the sale was confirmed on November 18, 1873. On December 26, 1873, the purchaser sold and conveyed the road, with all its property, franchises and privileges, to W. P. Elliott, and, on September 12, 1877, Elliott sold and conveyed the same property to the defendant, Aiken, who has since operated the road under the charter.

The complainants were merchants in Rogersville, en-

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gaged in buying and selling hardware, family groceries, produce, implements of husbandry, etc., and have been so carrying on business since the 1st of January, 1879. During this period, they have been required by the defendant to pay as freight for articles carried on said road of fifteen miles from Rogersville to the East Tennessee, Virginia & Georgia road from twenty to twenty-five cents per hundred pounds on heavy articles (no articles of measurement having been shipped to them), and have paid him accordingly, the gross amount of their payments aggregating about \$4,000. The complainants insist that, under the charter of the company, the legal rate of freight for the length of said road would only be $5\frac{1}{2}$ cents per hundred pounds, and the main object of the bill is to recover the excess of payments over the legal rate of charge.

The bill further states that the defendant, as an inducement to other merchants in Lee county, Virginia, and Hancock county, Tennessee, to have their goods shipped to Rogersville, so as to pass over his road, has entered into a contract with those merchants not to charge them exceeding fifteen cents per hundred pounds on any and all articles for carriage on his road, and that large shipments have accordingly been made over the road to these merchants. The complainants allege that this discrimination is illegal, and ask the court to enjoin the defendant from so discriminating.

The demurrer raises the questions whether the defendant is liable to the suit individually instead of the corporation, and whether the charges of freight and

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discrimination complained of are authorized by the charter of the Rogersville & Jefferson Railroad Company.

The bill alleges that the defendant is the owner of the road, operating it under the franchises of the charter of the Rogersville & Jefferson Railroad Company; that he required the complainants to pay the rates of freight charged, and that the payments were made to him. It does not allege that the original corporation is in existence or running the road under its charter. The first ground of demurrer is, therefore, clearly bad, unless, as matter of law, the facts stated in relation to the sale of the road, with its property and franchises, under the decree of the court, and the subsequent sales by the purchaser to Elliott, and by Elliott to the defendant, made him a body politic and corporate under the name and style of the Rogersville & Jefferson Railroad Company. But the several sales, according to the statements of the bill, were merely of the road, its property and franchises. The franchises thus sold would be such as appertain to the use of the property, and without which the road would be of little value: *Morgan v. Louisiana*, 93 U. S., 217. The franchise to form a corporation and act in a corporate capacity means the power to charter a new corporation by appointing the corporators. Such a power is legislative, and cannot be presumed from a mere authority to sell the property and franchises of an existing corporation: *Meyer v. Johnson*, 53 Ala., 237; *State v. Sherman*, 22 Ohio St., 428; *Smith v. Gower*, 2 Duer., 17; *Wilson v. Gaines*, 3

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Tenn. Ch., 602. The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable. The franchise to be a corporation is not the subject of sale and transfer, unless by some positive provision of statute law, pointing out the mode in which the transfer may be made: *Hall v. Sullivan Railway Company*, 21 Law Rep., 138. If, in fact, there was a valid sale of the right to be a corporation, or if the defendant has become a body politic and corporate, it may be shown by proper pleading. The bill itself does not show that the defendant is acting otherwise than as an individual.

The second ground of demurrer raises the question as to the right of the defendant to demand and take from the complainant as freight on heavy articles from twenty to twenty-five cents per hundred pounds for carriage over the road which is only fifteen miles long. The bill alleges that the defendant has been and is operating the road under the provisions of the charter of the Rogersville & Jefferson Railroad Company. In this view, the defendant is bound by the provisions of the charter. Those provisions are that the charges for transportation shall not exceed 35 cents per hundred pounds on heavy articles for every hundred miles. And the question is whether the statute merely fixes a maximum charge for every hundred miles, leaving the company at liberty to establish the

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rates for shorter distances within the maximum, or establishes a rate for all distances.

The statute which regulates the freight charges in this State is the act of 1845, ch. 1, sec. 14, being the act chartering the Nashville & Chattanooga Railroad Company. That section confers upon the company the exclusive privilege to carry freight and passengers over the road, and adds: "Provided, that the charge for transportation or conveyance shall not exceed 35 cents per hundred pounds on heavy articles, and 10 cents per cubic foot on articles of measurement for every hundred miles, and 5 cents a mile for every passenger; and provided also, that the said company may, when they see fit, farm out their right of transportation on said road subject to the rate above mentioned." Looking to the general intent of the act incorporating a railroad company, and giving the language of the particular clause a reasonable construction, it can scarcely be doubted that the Legislature intended to confer upon the company the right to charge, as a common carrier, for freight and passengers carried over its road, or any part of it. The rule in the construction of charters of corporations unquestionably is, in case of ambiguity, to give the public the benefit of the doubt: *Barrett v. Stockton Railway Company*, 2 Man. & G., 134; 7 *Id.*, 870; *Proprietors of the Stourbridge Canal v. Wheeley*, 2 B. & Ad., 793; *Camden etc., Railroad Company v. Briggs*, 22 N. J. L., 623. But the rule in this as in all other cases, is not to be astute in finding an ambiguity, and to give the language a fair construction, in the light of surround-

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ing circumstances, to ascertain the legislative intent. If inclined to be literal, the court might say, although not contended for in argument, that there is no provision for a charge for freight at all except upon a hundred pounds for a hundred miles. But as this construction would be manifestly unjust for roads of over one hundred miles, would deprive all roads of less length of any right of freight whatever, and is not fairly deducible from the language used, it is clearly inadmissible.

The consideration for the statutory toll or freight, which a railroad company is authorized to take, is not merely the transportation over the road, but the services performed, accommodation afforded, and expense and risk incurred in and about the running, loading, unloading, and delivering the goods: *Pegler v. Monmouthshire Railroad & Canal Company*, 6. H. & N., 644. And as these services, etc., are the same on like shipments for short or for long distances, it is obvious that the charge for short distances may be larger than for long distances, and yet reasonable. Accordingly, when the Legislature has undertaken to regulate the details of the charges for carriage, provision has generally been made for a higher charge for shorter distances: *State ex rel. v. M. & M. Railroad Company*, 59 Ala., 321; *Texas Express Company v. Texas, etc., Railroad Company*, 6 Fed. Rep., 426. In Alabama, the additional charge is not exceeding 50 cents more than the rate charged for the same description of goods over the whole line of the road. The Texas statute allows railroad companies to charge and receive not

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exceeding the rate of 50 cents per hundred pounds per hundred miles for the transportation of freight, and when the distance is fifty miles or less, the charge shall not exceed 30 cents per hundred pounds. The English statutes make special provisions for short distances.

Railroad companies, as *quasi* public corporations exercising franchises granted in consideration of accommodations afforded the public, are required and may be compelled by the courts to afford reasonable and impartial facilities of transportation. Their charges, when not regulated by charter or by statute, must be reasonable, and the courts will determine whether their charges are reasonable: *Munn v. Illinois*, 94 U. S., 113, 133; *Chicago v. Iowa*, 94 U. S., 155; *Reg. v. Grand Junction Co.*, 4 A. & El., 16. If only a maximum limit of charge be fixed by charter, the reasonableness of other charges within the limit may be tested in the courts. If the charge for each service be fixed by law, or if the intention of the Legislature is clear to only allow certain specified fares or tolls, leaving other cases unprovided for, the company must abide by its contract.

The statutory provision now under consideration starts out with conferring upon each railroad company entitled to its benefits, "the exclusive privilege to carry freight and passengers" over its road. Each company thereby becomes a common carrier, presumably authorized to demand and receive reasonable compensation for the services which, as a common carrier, it is required to perform. This presumption is made a certainty by the following clause undertaking, although in very gen-

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eral language, to legislate in regard to those charges. Clearly, as we have seen, it was not intended to confine the right to charge the stipulated freight on heavy articles to the only case specified, namely, on one hundred pounds for one hundred miles. The statute does not, therefore, fall in that class of legislation where the intention is to only allow certain specified tolls, leaving all other cases of transportation unprovided for. In this view the statute was either intended to establish a rate for intermediate distances, and weights in proportion to the amount specified, or to establish a maximum beyond which the company could not go, but within which it might make a tariff of charges dependent for its validity upon its being reasonable in any particular instance. The complainants contend for the first of these constructions, the defendant for the other.

The language of the act, it will be noticed, does not in terms say that the charge for other distances and weights than those mentioned, shall be at the same rate as the latter, nor does it, as in the case of a passenger, fix a unit of distance sufficiently small to afford a mode of measurement or proportion for other cases. If, too, we undertake to proportion the charge for short distances and smaller weights by the charge specified, we find that it leads to precisely the same results, where the road is less than a hundred miles, that the construction of the statute which we have discarded, would lead to, namely, that for roads of a certain shortness, the road before us being a striking illustration, there would be no compensation for the

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services required to be performed. And even the proportion on long roads of small parcels, whether charged by weight or measurement, would be infinitesimal. Thus, the statute allows on one hundred pounds for one hundred miles, 35 cents, and the proportion of charge on one pound for one hundred miles would be $\frac{7}{20}$ of one cent; and one pound for one mile the one hundredth part of $\frac{7}{20}$ of one cent. The charge for one hundred pounds on the whole length of defendant's road would be about 5 cents, and for one pound $\frac{1}{20}$ of one cent. It cannot be supposed that the Legislature intended such a result, unless it has said so, or used language which fairly requires such a construction. In the absence of any words fixing a smaller unit, or indicating a proportion, the obvious and natural inference would be that the Legislature had in mind only the unit of one hundred miles and one hundred pounds, and intended merely to designate a maximum of charge.

The case of *Knox v. Railroad Company*, 5 S. C., 22, so much relied on by the counsel of complainants, is not in conflict with these views. The statute of South Carolina, construed in that case, authorized the company to charge "for the transportation of goods by weight not exceeding 50 cents per hundred pounds per hundred miles." The court, whether correctly or not it is unnecessary to enquire, construed the language as plainly requiring that the charge for less than a hundred miles should be in the proportion of the charge for the distance specified in the statute. So, where a statute of Alabama provided that the company might "for transportation of local freight demand

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and receive not exceeding 50 cents more than the rate charged for the same description of freight over the whole line of its road," the Supreme Court of the State held that "rate" was the emphatic word of the sentence, and was employed in the sense of proportion; and that the 50 cents allowed was in addition to the rate per mile of the charge over the whole road: *State ex rel. v. M. & M. Railroad Company*, 59 Ala., 321; *M. & M. Railroad Company v. Sturm*, 61 Ala., 589. Our statute is that the charge shall not exceed 35 cents per hundred pounds for every hundred miles. The courts of South Carolina and Alabama admit the hardship of the construction of their statutes upon the railroad companies, but felt themselves constrained to adopt it because the language used showed a legislative intent that the charges should be proportioned. We are of opinion that no such intent appears in the language of our statute; that the object was to fix a maximum charge beyond which the companies could not go, and to leave the tariff of charges, within that limit, to the companies, subject to the rules of the common law, and the regulating power of the courts, and the Legislature. The second ground of demurrer, is, therefore, well taken.

The third ground of demurrer is that the facts stated in the bill do not show a case of improper discrimination within the meaning of the franchises under which the defendant is operating his road. The facts are that the defendant, to induce merchants in Lee county, Virginia, and Hancock county, Tennessee, to ship over his road, instead of taking a different

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route, has entered into a contract with them not to charge exceeding 15 cents per hundred pounds on their goods. And the question is whether the defendant can make such a contract, under the circumstances stated.

The English authorities hold that at common law the common carrier is not bound to carry at equal rates for all customers in like condition. The authorities are collected in *McDuffee v. Portland & Rochester Railroad*, 52 N. H., 430, and in 3 Am. & Eng. R. Cas., 602. In this country, the courts have generally held otherwise, and that statutes prohibiting discrimination are merely declaratory of the common law: *Sinking Fund Cases*, 99 U. S., 719; *Messenger v. Pennsylvania Railroad Company*, 36 N. J. L., 407, 531. Discrimination in rates of freight, if fair and reasonable, and founded on grounds consistent with the public interest, are allowable: *Hersh v. Northern, etc., Railroad Company*, 74 Pa. St., 181; *Chicago, etc., Railroad Company v. People*, 67 Ill., 11; *Fitchburg Railroad Company v. Gage*, 12 Gray, 393. The important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of any one unless it be shown that unreasonable inequality had been made to his detriment. A reasonable price paid by such a party is not made unreasonable by a less price paid by others. Or, as said by Crompton, J., to the plaintiff, upon the trial of such a suit: "The charging another party too little is not charging you too much": *Garten v. B. & E. Railroad Company*, 1 B. & S., 112, 154, 165; *McDuffee v.*

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Portland & Rochester Railroad, 52 N. H., 430. In determining whether a company has given undue preference to a particular person, the court may look to the interests of the company: *Ransome v. Eastern Counties Railway*, 1 C. B. N. S., 437; 1 *Id.*, 135.

In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may, nevertheless, lower the charge of another person if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place, and in the same condition. His object was to get business for his road from persons at a distance from its terminus, which otherwise would reach their destination by a different route. Under these circumstances, we cannot see that the contracts complained of are against public policy, or that the complainants have been damaged, if the charges on their goods were reasonable. The bill contains no allegation that the charges made against, and paid by the complainants were unreasonable. Without such an averment, there has been no damage. The third ground of demurrer was, therefore, well taken.

Affirm the decree with costs.

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RAGAN & BUFFET v. H. M. AIKEN.

SUPREME COURT PRACTICE. *Dismissal of injunction bill. Remand.* Upon the dismissal of an injunction bill by decree of this court, the injunction bond being conditioned to pay such costs and damages as the court may order, the defendant is entitled to a reference to ascertain the damages, for which purpose the cause will be remanded to the chancery court.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville. H.
C. SMITH, Ch.

SHIELDS & SHIELDS, KYLE & McDERMOTT and J.
B. HEISKELL for complainants.

W. P. GILLENWATERS and A. D. HUFFMASTER for
defendant.

COOPER, J., delivered the opinion of the court.

The bill in this case having been dismissed at this term upon demurrer. the defendant moves the court for judgment against the complainants, and their sureties, on the injunction bond executed in accordance with the fiat of the chancellor granting an injunction.

The bill prayed that an injunction issue to restrain and inhibit the defendant "from charging on the goods shipped to complainants any higher rate than 5½ cents per hundred pounds, and from discriminating in his charges on freights transported over his road in favor of other merchants and against complainants."

Ragan & Buffet v. Aiken.

The chancellor directed the injunction to issue upon the complainants executing bond with good security in the sum of one thousand dollars, conditioned as the law directs. The bond was given conditioned for the payment of all such costs and damages as may be awarded and recovered against the complainants in any suit or suits which may be hereafter brought for wrongfully suing out said injunction, and shall moreover abide by and perform such orders and decrees as the court may make in this cause, and pay such costs and damages as the court may order. The usual condition of the bond, when a judgment is not entered, is prescribed by the Code, sec. 4439, sub-sec. 2, "to pay costs and damages awarded by the chancery court in dismissing the bill." And this condition is substantially contained in the last clause of the condition of the bond as above. And by Code, sec. 4442, the damages may be ascertained by the court in which the cause is heard and bill dismissed, upon reference to the clerk and master, or upon an issue of fact made up and tried as other issues of fact.

The decree of this court is the decree which the chancery court should have made, and did actually make in this case, and is, within the meaning of the statute, the decree of that court. The defendant is entitled to his reference to ascertain the damages, and for this purpose the cause will be remanded to the chancery court for proceedings accordingly.

Andrew Johnson's Estate.

IN THE MATTER OF ANDREW JOHNSON'S ESTATE.

APPEAL. *Interlocutory order.* After decree fixing the basis of account in an administration suit is submitted to and account taken thereon, an appeal does not lie from an interlocutory order recommitting the account, but only from a final decree.

FROM GREENE.

Appeal from the Chancery Court at Greeneville.
H. C. SMITH, Ch.

J. P. & J. K. SHIELDS for complainant.

ROBINSON & MALONEY and R. M. BARTON for respondents.

FREEMAN, J., delivered the opinion of the court.

On examination of the record we find that there was a decree rendered on regular hearing of the issue made in the pleading between the parties, settling the rights of the parties, and an account ordered involving all the matters necessary to a complete settlement of the estate. The clerk made a most voluminous report, which was excepted to by both complainant and respondents.

A number of exceptions going to the whole, and to various items of the account, were sustained, and the whole re-committed to the master for another report. It is true several items were definitely settled

Andrew Johnson's Estate.

by the chancellor, and in this form would come into the next report, but the reference would include these even.

The question of compensation debated before us is specifically re-referred to be reported upon, and what shall be reasonable compensation to Andrew Johnson, Jr. The court gave specific directions as to re-taking the account covering the whole ground, and from this decree the appeal is prosecuted.

It is not a debatable question that no appeal under our law will lie from such a decree. The decree making the reference originally was very general, but was intended to and did embrace all matters involved in the settlement of the estate, and required a final account, preparatory to a final decree. From this an appeal lay by permission of the chancellor. But no other appeal lies until a report is made, and decree on it final; otherwise, we would now settle directions for the report on this appeal, and then, if complete, and decree on it, another appeal would lie; and so we might, and would probably have two appeals instead of one. In fact the practice, if permitted in this case might involve several more appeals.

We have no authority to take cognizance of this case, as it now stands, and the appeal must be dismissed as improvidently granted. Costs by respondents.

Lane v. Jones.

THOMAS J. LANE v. GEO. E. JONES *et al.*

1. PARTNERSHIP. *Prior equity of partner. Dissolved firm.* A partner in a dissolved firm has a lien on partnership realty for the amount due him on general settlement of the partnership account, superior to the execution lien of post-dissolution creditors of another member of the firm, though it had been dissolved for five years, and the title stood in the name of the individual members of the firm.
2. SAME. *Failure of Settlement* And this lien will prevail when there was a parol agreement of partial settlement, by which the other members were to convey the realty to the creditor member of the firm, but failed to complete the conveyance.
3. SAME. *Extent of partnership account.* This lien extends not only to indebtedness arising from inequality of capital contributed, but also of personal account with the firm.
4. TRANSFER TO FEDERAL COURT. *Amount involved.* Two non-resident defendants, whose several claims, each less than \$500, are enjoined in the same suit, cannot, by assignment of one to the other pending the suit, unite them in one, and thus obtain the right to a transfer of the cause to the Federal Court on the ground that the amount involved between complainant and one of them is over \$500.

FROM GREENE.

Appeal from the Chancery Court at Greeneville.

E. C. REEVES, Sp. Ch.

H. H. INGERSOLL for complainant.

ROBERT M. MCKEE for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed to enjoin the sale of a store-house and lot, and to assert a superior equity of complain-

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ant to the same on substantially the following state of facts:

In 1865, complainant, with Jones and Marsh, went into the mercantile business in the town of Greeneville, under the style of Jones, Marsh & Co. Complainant put in as his capital the lot on which the store now stands, at \$1,200, and \$1,000 in cash. The others paid their capital probably in cash—the capital being \$4,400. The firm continued in business until 1875, when it was dissolved by mutual consent. Jones and Marsh took the stock of goods valued at \$4,000. Complainant was to have the store-house. The assets of the firm being left under control of the other members to collect and pay debts. These assets amounted to about \$9,000 in notes, accounts and judgments, of which \$5,000 was estimated good. The debts amounted to between \$1,500 and \$2,000. It is charged that on the dissolution, the other two partners owed the complainant about \$3,000, arising out of differences in their accounts with the firm—they both having families to support, and complainant not.

The firm has never been settled up as appears, nor was there any further adjustment of its matters, than as stated, except an agreement that the other two should convey and release their interest in the store-house and lot, to complainant. They are shown to have prepared a deed for this purpose, which was signed by the parties, but never delivered—and Marsh dying, probably in a year after the dissolution, the deed cannot now be effectuated, and so this arrangement has failed.

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Having failed to get the title, the property has been levied upon for the individual debts of the other parties, that is on what is claimed as their undivided share. To enjoin this sale, and have an account ascertaining the amount due the complainant as partner, and assert his superior lien on this property is the object of this bill.

There is no question that the property was partnership realty—so treated by the parties, and bought for this purpose.

Assuming the partnership to have been simply dissolved, and the transaction not to have been a sale of a partner's interest, and that the partnership account is still unsettled, there can be no question the complainant has the right to have the partnership account taken, and the balance due him from the other partners ascertained, if any.

We take it to be settled, too, that each partner has a lien on all the partnership property on dissolution, for settlement of any balances found due on taking the partnership account, and this is superior to the right of a creditor of any individual member of the firm: 2 Head, 84.

The agreement by which this property was to be conveyed having failed, it stood precisely as it stood before the agreement, as partnership property, and subject to partnership liabilities, burdened with partnership liabilities.

This being so, it follows, that the partnership account must be taken—balance ascertained—and any sum found due complainant is a prior lien on this prop-

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erty, and the creditors of the individual member can only take any surplus that may be found due their debtor.

The chancellor erred in confining the account to capital put in by the parties. The whole account must be taken in order to ascertain net balances.

On or about the time of the hearing, after the case had been remanded from this court, an appeal from the decree of the chancellor overruling a demurrer, a petition was filed to transfer the case of one of the petitioners to the Circuit Court of the United States.

The debt of the petitioner claimed in the pleadings, was something over \$300, but there was another creditor defendant, who is stated in the petition to have assigned his judgment a month before, to the petitioner, the two debts making over \$500. The chancellor refused to transfer, and we think correctly. The Federal courts can take jurisdiction of claims of \$500, or over, exclusive of costs. Complainant's claim on the record can alone be looked to to ascertain this fact, and not rights obtained after the commencement of the suit. The claim of the other party still stands on the record in his own name: See Jurisdiction U. S. Courts, by Curtis, 124, 125.

This being so, it follows, the Federal courts had no jurisdiction of the sum claimed by the party on the record, and the case was not one where there was shown a right to the transfer sought.

The chancellor's decree will be modified as indicated, and case remanded to be proceeded in according to this opinion. Costs paid by respondents.

Scott v. Turley.

WASHINGTON SCOTT v. W. H. TURLEY *et al.*

1. AGENCY. *Good faith to principal.* An agent who agrees to take the money of his principal and loan it to good parties, must loan it in fact; he cannot use the money himself, and pay the principal with the note of a third person based on a different consideration, without advising him of the facts.
2. SAME. *Repudiation by principal.* A principal, who receives from his agent the note of a third person under the belief that it belongs to him as his property, is not, upon a subsequent discovery of the facts and prompt repudiation, to be charged with the note because he did not sue upon it to the first terms of court held thereafter.
3. SAME. *Same. Inconsistent conduct. Departure in pleading unnoticed.* Where the principal, after receiving from the agent the note of a third person under a mistake of fact, recovers judgment upon the note and then files a bill thereon to reach equitable assets, and afterwards, upon discovering the truth, files an amended and supplemental bill in that cause, bringing the agent before the court, repudiating his act, and seeking to hold him individually liable for the debt, while insisting at the same time upon the relief sought in the original bill, and the agent answers to the merits, without objecting to the form of suit or setting up the defense of ratification by reason of the course pursued, the principal will be entitled to relief under the bill repudiating the act of the agent. The amended and supplemental bill filed under such circumstances is, in substance, an original bill upon a different cause of action, and if the defendant, without objection, goes to trial on the merits, must be treated as such.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W. B. STALEY, Ch.

CORNICK & CORNICK for complainant.

H. H. TAYLOR for respondents.

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COOPER, J., delivered the opinion of the court.

The original and first amended and supplemental bills in this case were filed by Scott, as a judgment creditor of the defendant, W. H. Turley, upon a return of execution *nulla bona*, to reach the equitable interest of the debtor in certain real and personal assets in which the other defendants were interested. The second amended and supplemental bill made John B. Turley a party defendant and sought to reach property alleged to be in his hands belonging to the debtor. Before process issued on this bill, it was further amended by stating facts upon which the complainant claimed that John B. Turley was liable to him for the full amount of the debt on which he had recovered judgment against W. H. Turley. On final hearing, the chancellor dismissed the bills so far as they sought to hold John B. Turley liable as the principal debtor, but declared the complainant entitled to relief to the extent of the interest of W. H. Turley in certain equitable assets, and ordered accounts for the purpose of ascertaining the extent of his interest. From this decree, the complainant, by leave of the chancellor, prayed and obtained an appeal before taking the accounts.

The principal contest is over the liability of the defendant John B. Turley directly to the complainant for the whole debt claimed. John B. Turley and W. H. Turley are brothers, and John B. Turley married the sister of the complainant, Scott. John B. Turley came to Knoxville about the year 1870, and Scott

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seems to have followed him shortly afterwards, residing, when not absent on trips, which he appears frequently to have made, in the house of John B. Turley as a member of his family. Sometime towards the close of the summer of 1873, complainant, having \$3,000 on deposit in a bank at Knoxville, and being about to leave the city for an uncertain period, entrusted the money to John B. Turley to loan for him. Turley himself says that he told complainant he would make it yield him *ten per cent per annum*, and agreed to take it and do with it just what he did with his own money. He repeats in his deposition: "The only agreement was that I was to take the money and loan it to good parties, and do with it just as I would with my own." He did loan the money to merchants at Atlanta on call at the rate of one per cent a month. It was recalled and paid into bank on December 20, 1873, to the credit of John B. Turley, and was drawn out by him on his checks for various sums between that date and February 26, 1874, the largest check being for \$1,000 on January 8, 1874. He concedes that all of these checks, except the one last mentioned, were drawn for his own benefit, and the money used by him for his own purposes. His recollection is, he says, that he drew the money himself on the large check, and handed it to W. H. Turley in Francisco's store on Gay street, loaning it to him with the understanding that he was to pay *ten per cent interest*. On November 1, 1876, upon a settlement between the two brothers of some of their transactions, W. H. Turley gave John B. Turley his note for \$3,267, and,

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at the request of his brother, executed his note to the complainant at 90 days, with interest at the rate of *ten per cent* for \$3,605. These notes were given for the balance of debt then found to be due from W. H. to John B. Turley.

The answer of the defendant, John B. Turley, contains the following statements: "It is true complainant was in Knoxville on divers occasions between August, 1873, and April, 1877, but as respondent remembers and believes he never once inquired about his money, or how it was secured. Respondent on several occasions mentioned the money to him, and told him, if he wanted it, he could at any time get it by calling for it, but he expressed no desire to call it in, and so the matter stood for nearly four years." Early in the month of April, 1877, the Commercial Bank of Knoxville, in which the complainant had a deposit of about \$4,500, failed, and complainant called upon defendant, John B. Turley, for the money left in his hands. Thereupon, John B. Turley handed to him the note of W. H. Turley of November 1, 1876, for \$3,605, as the form in which he then held it. The complainant took the note without comment. He applied to W. H. Turley for the money, which he promised to pay at certain times designated. Not complying with his promises, complainant brought suit to the February term, 1878, of the court, and recovered judgment on October 8, 1878, for \$4,304.12. The original bill was filed on December 6, 1878. The last amended and supplemental bill was filed July 9, 1880, upon the alleged recent discovery of the fact

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that John B. Turley had never loaned to W. H. Turley any part of the complainant's money, and that the note of \$3,605 was given for the pre-existing indebtedness of W. H. to John B. Turley. The recent discovery of the fact, if it be a fact, is not denied, nor does the defendant, John B. Turley, claim that he did directly loan to the defendant, W. H. Turley, more than \$1,000 of the complainant's money. And even the loan to this extent is expressly denied by W. H. Turley.

In the year 1871, John B. Turley loaned to W. H. Turley over \$10,000, and early in 1874 the two entered into partnership in the business of a tannery. On November 1, 1876, they made a settlement of the loan transaction, by which W. H. Turley was brought in debt to John B. Turley in the sum of \$5637.63. To this sum was added, according to John B. Turley, \$1248.37, but according to W. H. Turley, \$1234.37, and the two notes of that date, the one payable to John B. Turley, and the other to the complainant, were given for the gross sum. The sum of the two notes exactly corresponds with the figures as given by W. H. Turley, whose statement is doubtless the correct one. John B. Turley says that the sum added to the balance found in the loan transaction consisted of the \$1,000 of complainant's money loaned by him to W. H. Turley on January 8, 1874, with interest at the rate of *ten per cent per annum*. W. H. Turley denies that John B. Turley ever loaned to him any of complainant's money, and says that in their settlement John B. Turley claimed that the item in question was

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money of the complainant's used by him, John B. Turley, in the tannery business. And John B. Turley admits that the greater part of the complainant's money which he did use was used in that business. The testimony of the two brothers is, therefore, directly in conflict on this point. Neither is impeached, and it becomes important to ascertain which one is sustained by other evidence or by the circumstances. The burden of proof is on John B. Turley. He testifies that W. H. Turley, at the time of the alleged loan, said that he borrowed the money to pay a debt to the Masonic Lodge, and he introduces a witness who proves that W. H. Turley was a surety on a note to the Lodge, on which he had made several payments, both before and after January 8, 1874, and that he paid thereon, January 9, 1874, \$397.35, the next nearest payment being three months thereafter. On the other hand, is the striking fact that the interest on the item of \$1,000 included in the settlement falls short of the interest which would then have been due upon a loan of that amount on January 8, 1874, at the rate of *ten per cent per annum*, by the interest of over three months if we take the figures of John B. Turley, and of over five months if we take the obviously more correct figures of W. H. Turley. Moreover, John B. Turley admits the use of complainant's money in the tannery business, and might naturally, in a settlement with his brother, ask him to assume a part of the amount thus used. The weight of evidence is in favor of the version of W. H. Turley. At any rate, John B. Turley fails to

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show satisfactorily a loan of any of complainant's funds to W. H. Turley.

The question then is whether John B. Turley, after having made himself personally liable for the complainant's money by using it himself, instead of loaning it, can relieve himself by handing over to the complainant the note of a third person given for a pre-existing indebtedness to him, the agent, without laying before his principal all the facts? In his answer, John B. Turley assumes the position that as he was authorized to do with the complainant's money just what he did with his own, and as he had virtually loaned his own money to his brother by extending the time of payment, he might treat the complainant's money as loaned in the same way. His learned counsel has made no such argument. And it is obvious that an agent who agrees to take the money of his principal and "loan it to good parties," must loan it in fact. He cannot use the money of his principal himself, and then pay the principal with the note of his own debtor growing out of an independent transaction, without advising him of the fact. The utmost good faith is required between the parties occupying the fiduciary relation of principal and agent. It is equally clear that a principal, who receives the note of a third person from his agent under the belief that it belongs to him as his property, is not, upon a subsequent discovery of the facts and a repudiation of the act of the agent, to be charged with the amount of the note because he did not bring suit upon it to the first terms of court held thereafter. For that would be to reward

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the agent for his own wrong. In this case, the complainant was living at the house of John B. Turley, and acting, as the proof shows, with, if not under his advice. The pecuniary condition of his brother was probably known by John B. Turley, and certainly after January 2, 1878, when he took from him an assignment of all his personal effects.

The point relied upon by the counsel of John B. Turley, and upon which the chancellor dismissed the bill so far as it sought to charge him individually, is that the complainant, by his conduct, ratified the acts of the agent after he became aware of all the facts. The counsel insists that in the very bill seeking to charge his client personally, the complainant is also pursuing his remedy against W. H. Turley. And the fact is undoubtedly so, whether the conclusion sought to be deduced by the counsel is correct or not. The complainant, in his final *addendum*, prays for the same relief as prayed for in the previous bills, "and for all other and necessary relief." And the entire cause has been since prosecuted as if the complainant was entitled to relief as a judgment creditor of W. H. Turley, as well as relief against John B. Turley individually. During the progress of the suit, one piece of property sought to be reached by the original bill after satisfying prior liens, was sold, and the surplus proceeds of sale over the prior lien debts were paid into court, and, on complainant's motion, paid out to him or his counsel. The case is one, therefore, where the complainant, while expressly repudiating the act of his agent in his last bill, and seeking direct relief against

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him, is also, upon the previous proceedings enforcing the rights acquired under the act which he is repudiating. We have the anomaly of antagonistic rights being prosecuted in the same suit.

This anomaly grows out of the neglect of the settled rules of chancery pleading and practice. The *adendum*, as I have called it, to the second amended and supplemental bill, is, in substance, an original bill, based upon an entirely different cause of action from that of the other bills of the series. It was what in common law pleading would be called a departure from the party's case, and for that reason clearly demurrable: *Williams v. Winans*, 5 C. E. Green, 392; Sto. Eq. Pl., sec. 339, 616. But no demurrer was filed. The defendants, John B. and W. H. Turley, who were the only proper parties to the last bill, the latter upon the averments tending to show collusion between the brothers, filed their answer, in which they make no allusion to the defense now relied on. John B. Turley has tacitly acquiesced in the complainant's claim to double relief.

The general rule undoubtedly is that a principal, in order to hold his agent liable, must promptly, upon the facts coming to his knowledge, repudiate the act, and notify the agent that he looks to him for his money; and that if the principal, after knowledge of the act, avail himself of its advantages, he will be bound by it: *Walker v. Walker*, 7 Baxt., 260; S. C. 5 Heis., 425; *Williams v. Storm*, 6 Cold., 203; *Fort v. Coker*, 11 Heis., 579. A qualification of these general rules, in proper cases, is that acts of ratification

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to be sufficient must be something by which a party, by relying on them, has been prejudiced: *Doughaday, v. Crowell*, 3 Stockt., 201. And the rules themselves can scarcely apply when the principal has already repudiated his agent's act by suit.

In the case before us, the principal, in ignorance of the truth, had proceeded, upon the basis of the validity of the act, to recover judgment upon the note received from the agent, and to enforce the execution of the judgment out of the equitable assets of the debtor; and then, when advised of the truth, in the same suit brings in the agent, expressly repudiates the act, and asks for relief against him. While he is pressing his suit against the agent, he is also, the agent not objecting, striving to collect the judgment. If he had filed, as proper practice required, an independent original bill against the agent, which the latter had answered without setting up the defense of ratification, it is clear that no evidence would have been admissible of acts of ratification. Can the rule be different where, without objection, the litigation is embodied in the same suit, and no defense of ratification is made by the agent? The court must presume, in such case, that the original litigation is continued for the benefit of the agent. The principal^a has promptly, upon acquiring knowledge of the facts,^b by direct legal proceedings, notified the agent that he repudiates his act, and looks to him for redress, and has continuously pressed his suit. This was an ^celection to repudiate, enforced at once by suit. What he had previously done was in ignorance of his rights. What he may

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have subsequently done could not avoid the repudiation, and must be treated as done for the benefit, and with the consent of the agent. The latter cannot be prejudiced by it, for if complainant fails to reach equitable assets, he alone is liable for costs, and if he realizes anything it will enure to the benefit of the defendant. And the latter, if held personally liable, will be entitled to be subrogated to the benefit of the judgment and proceedings thereon, and to an assignment thereof upon payment of the recovery had against him. The chancellor erred in not giving complainant the relief sought against John B. Turley.

The chancellor granted the complainant all the relief he was entitled to, unless it may be in the matter of the Cocke land, bought by John B. Turley, but, in view of the liability of John B. Turley for the entire debt of the complainant, it is unnecessary to consider that branch of the case.

The decree will be reversed so far as it dismissed the bill seeking relief against John B. Turley individually, and a decree will be rendered in favor of the complainant against the defendant, John B. Turley, for the amount of the W. H. Turley note, treated as the amount of complainant's money then in his hands, with interest at the rate of *six per cent per annum*, or, at the option of the complainant, with the money of the complainant which came to his hands, with interest at the rate of *six per cent per annum* from the date of the conversion. The chancellor's decree will be in other respects affirmed. The defendant, John B. Turley, will be entitled to the benefit of any collec-

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tions made from W. H. Turley by having the same credited on the decree now rendered against him, and to an assignment of the judgment against W. H. Turley, and all rights then attached to it, upon payment of complainant's decree now rendered. The defendant, John B. Turley, will pay the costs of this court, the costs of the court below to await the coming in of the reports ordered.

PETITION TO REHEAR.

The petition for rehearing suggests that the opinion overlooks the testimony of both Scott and Turley to the effect that in June or July, 1876, Turley notified Scott that the money was ready for him, and that Scott told him to count up the interest, and keep it loaned as long as it was all right. The opinion does not undertake to set out all the evidence, nor did the judge who prepared the opinion overlook the particular evidence. It could not possibly change the admitted fact that all of the consideration of the W. H. Turley note to Scott, unless it be the \$1,000 item with interest, was an old debt of W. H. to John B. Turley.

The evidence bearing upon the \$1,000 item, although not referred to by counsel in his original brief, was not overlooked by the court. The memory of W. H. Turley was doubtless in fault as to time of payment of the note of the Masonic Lodge. The memory of John B. Turley is no better in several instances disclosed by the record. The bank account of

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W. H. Turley on the 8th of January, 1874, cuts both ways, for it shows no deposit of any sum borrowed on that day. The evidence referred to is insufficient to change the conclusion reached.

The opinion holds that Scott is not liable for any loss occasioned by his treating the note as his property in ignorance of the facts, especially as he was acting with, if not under the advice of defendant.

No new argument or authority is presented on the question of ratification, which was carefully considered before the opinion was delivered.

We do not think Scott is entitled, after being allowed to repudiate the act of his agent, and to hold him liable for the whole debt, to pursue so much of the other parts of the suit as sought to reach property in his hands in which W. H. Turley had an interest. The prosecution of the suit so far as it sought to reach other property of W. H. Turley was sustainable as being for the interest of John B. Turley.

The petitions are therefore disallowed.

Anderson v. Gossett.

STATE *ex rel.* W. A. ANDERSON v. C. B. GOSSETT.

ELECTION CONTEST. *Face of returns.* An action which undertakes to go behind the certificate of the returning officer of an election by the people, is a contest of the election within the meaning of our statutes, and, in the case of the office of sheriff, must be commenced and tried under the Code, sec. 889, and not under the Code, sec. 3409, *et seq.*

FROM KNOX.

Appeal from the Chancery Court at Knoxville.
W. B. STALEY, Ch.

WEBB & McCLUNG, HENDERSON & JOUROLMON and
H. H. INGERSOLL for relator.

H. R. GIBSON and LEWIS TILLMAN, Jr., for respondent.

COOPER, J., delivered the opinion of the court.

On August 5, 1880, an election was held in Knox county for the office of sheriff, the relator, Anderson, and the defendant, Gossett, being the opposing candidates. On the 9th of the same month, the old sheriff, whose duty it was to hold the election, declare the result, and deliver to the person elected a certificate of his election (Code, secs. 839, 864, 874), gave to the defendant a certificate that he had been elected sheriff of said county for the ensuing term of office, "he having received a majority of all the votes legally cast at said election for said office, as duly appears from a

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comparison of the polls by me this day made in the court-house in Knoxville, in pursuance of law." On the first day of September following, the defendant presented his certificate to the county court, and was inducted into office. Two days thereafter the present bill was filed, under the provisions of the Code, sec. 3409, *et seq.*, in the name of the State on the relation of Anderson against Gossett, as a usurper of the office, to have the relator's right to the office declared, and to recover from the defendant on behalf of the relator the fees and emoluments received. The defendant demurred to the bill upon the ground, among other causes, that it showed on its face that the defendant had received the certificate of election from the proper returning officer, and been inducted into office, that the bill sought to contest the election by going behind the official return and having a recount of the vote, and that the provisions of the Code, under which the bill was filed, expressly forbid such a contest where, as was the case with the office of sheriff, the validity of the election might be otherwise contested under the Code. The chancellor overruled the demurrer, but with leave to the defendant to rely upon the matters thereof in his answer, which was done. Upon final hearing, the chancellor granted the relief sought except as to the recovery of the fees and emoluments, which he was of opinion must be recovered in another suit. Both parties were dissatisfied, and have brought the decree before us for revision.

The bill proceeds upon the ground that the relator was elected sheriff by a majority of votes, "as ap-

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peared from the face of the returns of the election," and was entitled to the certificate of election. And the first point to be considered, raised by the demurrer, is whether the provisions of the Code under which the bill is filed, authorize such a contest?

By the Code, sec. 889, jurisdiction is conferred upon the circuit court to hear and determine all contests of the election of sheriffs. By the Code, secs. 3409, 3411-3413, a suit may be brought by bill in equity, by the attorney-general for the district or county, in the name of the State on the information of a relator, against the offending party, "whenever any person unlawfully holds or exercises any public office or franchise within this State, or any office in any corporation created by the laws of this State." Section 3419 is: "Whenever the action is brought against a person for usurping an office, in addition to the other allegations, the name of the person rightfully entitled to the office, with a statement of his right thereto, may be added, and the trial should, if practicable, determine the right of the contesting parties." Section 3423 is: "The validity of any election which may be contested under this Code cannot be tried under the provisions of this chapter."

The right which a party has in an office is an incorporeal right, and is enforced by a civil proceeding. The contest would be between individuals as to the right to exercise the functions and enjoy the emoluments of the office. And, in a contest over the office of sheriff, it has been said that such contests are tried without the State being a party or represented, and

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do not fall within the provisions of the Code, sec. 3409, *et seq.*, providing for cases where a party unlawfully usurps an office. The reason given was, that section 3423 forbids the trial under those provisions of the validity of any election which may be contested otherwise under the Code: *Boring v. Griffith*, 1 Heis., 455; *Conner v. Conner*, 8 Baxt., 11; *Lewis v. Watkins*, 3 Lea, 174, and see *State v. McConnell*, 3 Lea, 335. The learned judge who delivered the opinion of the court in the first of these cases, manifestly takes for granted that a contest of "the validity of an election" of the last named section, means the same as a contest of the election under the Code, sec. 889. And he construes the two sections together as meaning that as "all contests of the election of sheriffs" must be heard and determined by the court under sec. 889, any contest of the election of sheriffs cannot be tried under the provisions of section 3409, *et seq.* This construction was adopted in the other cases cited, and can scarcely admit of serious doubt. The intention of the Legislature was to have only one contest over elections, and that the contest should be had in the forum upon which the jurisdiction was expressly conferred. The provisions of the Code, sec. 3409, *et seq.*, might be construed to give an additional remedy, and section 3423 was inserted to exclude such a conclusion. The dissenting opinion in the *State v. Wright*, 10 Heis., takes a different view, and argues that the remedies are concurrent. The judge, who delivered the opinion of the court, adopts the more obvious construction that the jurisdiction under section 889 is exclusive,

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but argues that a bill filed under section 3409, based upon the returns as made, does not dispute the validity of the election, and is, therefore, not a contest of the election. It is in this view only a struggle over the *prima facie* case which entitles the apparently successful party to the certificate of election, leaving the "contest of the election" to be made by a separate suit in the circuit court. The result would be one suit for the form and another for the substance, the latter being postponed until the protracted litigation of the former had terminated. The argument of the opinion does, moreover, assume that the court, in determining the *prima facie* right to the certificate of election, may go behind the certificate, and look at the original returns upon which the returning officer acted. The case did not, however, require a consideration of this point. The opinion itself shows that the commissioner of registration, who was then the returning officer, compared the polls, and summed up the result, which showed the election of the relator by a majority of 176 votes, and thereupon made out a certificate of election for the relator, but for some unexplained reason never delivered it. The opinion further shows that shortly thereafter, the commissioner made his returns of the election to the county court, showing that the relator had received a majority of 176 votes, and marked opposite his name the word "elected." In a day or two thereafter the relator appeared before the county court, produced the official returns which had been filed by the commissioner, and demanded to be inducted into office. The matter was continued by

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the court, and, on the day of its final action, the commissioner presented to the court a paper which he styled an amended return, and was permitted to file. By this return, he undertook to throw out the vote of the tenth ward of the city of Memphis, for the reason that there was no voting place legally established therein. He only threw out the vote of this ward in the case of the sheriff's election, allowing it to stand as to the other county officers. It is obvious upon these facts that the commissioner had declared the result of the election, returned that result with the returns to the county court, whose duty it was to induct the person elected into office, in effect declaring the relator elected, and actually prepared a certificate of the election of the relator. He had exhausted his powers, and the subsequent return was not only a nullity, but upon its face a palpable fraud both because, being a mere ministerial officer, he had no power to throw out votes properly returned, and because the reason given for the act would have thrown out the vote as to the other county officers elected at the same time, which was not done. Accordingly, this court held "that the extraordinary conduct of the officer in registering the vote of the tenth ward was an arbitrary usurpation of power; that his powers were exhausted by his first computation and certificate thereof to the relator, and that all his subsequent action was without the warrant of law."

The decision of the court was, therefore, that the commissioner, as the returning officer, had found that the returns showed that the relator was elected sheriff,

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and had made a certificate of the fact to the relator, and that his subsequent acts were simply void. It was not necessary to go behind his return and certificate. The court merely ascertained the true return, installed the person entitled under it, and removed a usurper, who had no legal certificate.

The authorities are uniform that, except in a direct proceeding to try the title to the office, the correctness of the decision of the returning officer cannot be called in question: McCrary Law of Elect., sec. 221: Cooley Const. Lim., 788. It is one thing to ascertain that decision, and another thing to impeach it. To go behind it is to contest the election, and such a contest, in the case of a sheriff, must be made under the Code, sec. 889.

The decree below must be reversed, the demurrer of the defendant to the bill sustained, and the bill dismissed with costs of this court and the chancery court.

Allen v. The State.

JAMES ALLEN v. THE STATE.

1. APPEAL. *No, from order after conviction.* No appeal lies from an order of the trial court providing for the safe custody, within the jurisdiction of the court, of a prisoner, convicted of one offense, for trial of another offense of which he stands indicted in the same court.
2. SENTENCE. *Suspension of.* And, it seems, the court may suspend the execution of the judgment of conviction for this purpose.

FROM GREENE.

Appeal in error from the Circuit Court of Greene county. N. HACKER, J.

W. F. YARDLEY and L. L. LAWRENCE for plaintiff in error.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

On October 13, 1882, the plaintiff in error was found guilty of larceny by a jury, and judgment was rendered in accordance with the verdict. On the next day, an entry was made on the minutes of the court to the effect that the attorney-general, the defendant being at the bar in proper person as well as by attorney, moved the court to "suspend the judgment," which was accordingly done, until the next term. The entry recites as the reason for this action, that it appeared to the court "from the record and the trans-

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actions in open court in this cause and in the other cause" of an indictment against the prisoner for the grand larceny of a horse, that the latter indictment was found on October 11th, and the indictment on which defendant stood convicted on October 12, 1882; that the trial of the first indictment was continued until the next term by the defendant; and that the defendant went to trial upon the second indictment, but withdrew his plea of not guilty after the examination of the first witness, whereupon the jury assessed his punishment to four years in the penitentiary, and judgment was rendered accordingly. The entry recites that the court, being of opinion from these facts that the judgment should be suspended until the next term in order that he might be tried on the other indictment, suspends the judgment accordingly. To the ruling of the court in sustaining the motion of the attorney-general, and suspending the judgment, the defendant excepted, and prayed an appeal in the nature of a writ of error from the judgment of suspension which was granted.

The trial court may suspend the execution of its judgment in a proper case: *Allen v. State*, M. & Y., 274; *Fults v. State*, 2 Sneed, 232; *Whitney v. State*, 6 Lea, 249. In the first of these cases, after the rendition of a judgment upon a verdict of manslaughter, there was an entry upon the minutes to the effect that the defendant moved the court to suspend the execution of the judgment until the next term, and to take bail for his appearance, to the end that he might apply to the governor for pardon, which motion was

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overruled, and the defendant prayed an appeal, which was granted. This court was of opinion that the entry thus made, and the matter thereof were no part of the record, not having been made such by a bill of exceptions. In that view, the entry in the case before us is no part of the record, and cannot be noticed. But if it were otherwise, the Criminal Code, sections 5228, 5273, 5274, provides for the trial, conviction and punishment of a defendant for several distinct offenses, the punishment of imprisonment in one case to commence at the end of the term in another. The trial court has the authority to retain the prisoner within its jurisdiction, and provide for his safe custody until he can be tried for each of several offenses of which he may stand indicted. No appeal lies from an order made for these purposes.

Appeal dismissed.

McDonald v. Lusk.

B. J. McDONALD *et al.* v. ROBERT LUSK *et al.*

EQUITABLE ESTOPPEL. *Recitals in deed. Insufficient description.* The recital of a deed excepting out of the conveyance lands embraced therein must, to work an estoppel, be as definite and descriptive as are required by law in a deed of conveyance, either by their presence in the deed relied on as an estoppel, or by a reference to another in which they are sufficiently set out.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

R. M. BARTON for complainants.

M. H. CLIFT and KEY & RICHMOND for respondents.

TURNER, J., delivered the opinion of the court.

Complainants were sued in an action of ejectment in the circuit court of Hamilton county. They filed this bill to enjoin that action, charging that they are the heirs at law of John Patterson, who held under a deed from Moses McSpadden. That John Hackett conveyed to Moses McSpadden in 1809. That the title papers from McSpadden to John Patterson have been lost, etc.

Amongst other things, they pray that such title papers "be discovered and set up and established." "That the deed from Hackett to McSpadden be cor-

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rected so as to read in the line called for next before the closing line north 45° west, instead of 45° east, to the foot of the mountain."

The answer admits a deed from Hackett to McSpadden, but denies any conveyance by McSpadden to John Patterson, and none is shown to have ever existed.

The defendants filed a number of title papers, and complainants insist that although they have failed to show the title papers claimed by their bill, the defendants are estopped to deny their existence by recitals in their own evidences of title, especially in the deed of Josiah Danforth to McClung and Corsby. The language of that deed relied upon as an estoppel, is as follows: "The following tract of land, excluding therefrom the lands hereinafter described as being reserved, the said tract containing twenty thousand acres, be the same more or less, it being the same tract of land that was granted by the State of North Carolina to Stokly Donaldson," and then in another portion of the deed, "Reserving out of the same such lands as are reserved by John Hackett in his deed of trust to John Williams, given for the purpose of securing to Charles McClung the payment of the sum or sums of money therein mentioned, lying in that part of said land to which the Indian title is not extinguished, as also the further following tracts of land conveyed to Josiah Danforth in trust to Robert Patterson, supposed to contain about three hundred acres."

It is now insisted, "This proves that either Donaldson or Danforth executed a deed to John Hackett for a part of the twenty thousand acre grant, and that Dan-

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forth conveyed to Robert Patterson a tract of about three hundred acres."

Admitting the fact to be as claimed, still the recitals are not such as will work an estoppel under the case made by the record. The reservation is of about three hundred acres from a grant of twenty thousand acres, and in that part of the twenty thousand acres in which the Indian title is not extinguished. This is not such description as would enable a surveyor or any one else to go upon the granted lands and lay off the three hundred acres.

The recitals to work an estoppel must be as definite and descriptive as are required by law in a deed of conveyance, either by their presence in the deed relied on as estoppel or by reference to another in which they are sufficiently set out. Besides, there is no reference by the deed of Danforth to any deed or evidence of title in John Patterson.

As complainants have failed to show the existence and loss of John Patterson's title papers, or to connect themselves with the title from Hackett to McSpadden, they are not entitled to the equitable relief prayed for. The decree is reversed, the bill dismissed with costs, and the parties remitted to their rights at law.

Hartman v. Allen.

SARAH HARTMAN, Adm'x, *et al.* v. JAMES ALLEN *et al.*

FRAUDULENT CONVEYANCE. *Deed in trust.* A conveyance in trust of all the debtor's property (realty) to secure a debt of only one-third its value, with two-and-a-half years to run before maturity, is fraudulent in law, though the creditor have no purpose except to secure his debt.

FROM GREENE.

Appeal from the Chancery Court at Greeneville.
H. C. SMITH, Ch.

ROBERT M. MCKEE for complainant.

H. H. INGERSOLL for defendant.

McFARLAND, J., delivered the opinion of the court.

This is an appeal from a decree of the chancellor overruling a demurrer to complainant's bill. The allegations in substance are, that some six months before the filing of the bill, to-wit, on the 21st of August, 1880, complainant, as the personal representative of William Rader, recovered two judgments against the defendant, James Allen, in the aggregate for something more than \$1,000, upon which executions had been issued and returned *nulla bona*, on the 2d of March, 1881.

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On the 27th of January, 1881, said Allen conveyed to D. R. Britton, as trustee, two tracts of land, worth in the aggregate \$15,000, to secure to the defendant, B. F. Ernest, the payment of two notes, of date the 26th of January, 1881, one payable to him as administrator of Peter Ernest, deceased, for \$3,453.54, the other payable to him as administrator of N. W. Ernest, deceased, for \$1,015, and both due at one day. That the deed conveyed all the property legally owned by said Allen, out of which his creditors could have their debts satisfied. The deed secured no other debts except those specified to Ernest, and left unsecured, besides the debts to complainant, a security debt for more than \$1,000, and another debt of about \$600, and perhaps other debts. In the language of the bill, "the deed secures to said James Allen two years and six months from the date thereof, within which to pay said secured debts, and in case of failure at the expiration of the time, the trustee is to advertise and sell.

It is charged that the purpose of the defendant Allen, in the execution of the deed, was to hinder and delay complainants and his other creditors. As to Ernest, the bill says: "Complainants not being fully advised, do not now expressly charge that said Ernest had knowledge of the fraudulent purpose of James Allen, but he is required to answer on oath." And it is charged, upon the facts above stated, that the deed is fraudulent in law.

The bill was filed on the 19th of March, 1881, in less than two months after the deed was executed.

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It prays that the deed be set aside and the land at once sold. The prayer of the bill, as first filed, was to have proceeds applied first to Ernest's debts, but this was amended so as to pray for priority over Ernest. The bill prays, in the alternative that the relief first prayed for cannot be granted, that Allen's interest or equity in the land be sold subject to the deed of trust, or that the cause be retained in court until the maturity of the deed of trust, and the deed then foreclosed. It is not insisted that the demurrer of the defendant Allen should be maintained. As to him, it is admitted that the bill at all events makes a case for the sale of the property subject to the deed of trust or of Allen's equity of redemption, and therefore the demurrer as to him was properly overruled.

But as to Ernest, it is argued that the bill does not charge him with a participation in the fraudulent purpose of Allen, and that it does not make a case of fraud by construction of law; that the only case made for relief is for a sale of Allen's interest in equity in the land subject to the deed, and for this purpose Ernest is not a necessary party.

There is no sufficient charge of fraud in fact against Ernest to require him to answer, but the question is, whether the bill makes a case of fraud by construction of law. The delay of two years and six months of itself would not ordinarily be regarded as unreasonable, but the bill charges that the property conveyed embraced all that the debtor legally owned, subject to his debts, and was of value more than three times the amount of the debts secured. Says the bill, one-

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third of the property conveyed would have been ample security for the debts. The question is, whether a deed of trust of this character, securing to the debtor the possession of the land for two years and six months, does not necessarily hinder and delay the creditors unreasonably. Says Judge Wright, in *Doyle v. Smith*, 1 Cold., 21: "But it seems if there be no actual or intentional fraud, that this doctrine of legal fraud because of excessive delay in closing a trust does not necessarily apply, unless all or the greater portion of the property be included in the assurance, and unless also its value be greatly or unreasonably beyond the amount of the debt to be secured. If *these circumstances concur*, then the period of indulgence to the debtor becomes important to other creditors, because to the surplus beyond the grantee's claim they must look for satisfaction of their demands."

Similar language is used by Judge Reese, in *Bennett v. Union Bank*, 5 Hum., 617. He says: "If the excess in the value of the property over the debt were considerable and the time of the indulgence long, the evidence of a fraudulent purpose in the face of the instrument would become greater, and that evidence would become more and more pregnant in proportion as the excess in value were increased and the time of indulgence prolonged."

In *Mitchell v. Beal*, 8 Yer., 134, all the debtor's property was conveyed; it was twice the value of the debt, and the time of indulgence was three years. It was held void, but there was other evidence of fraud in that case. The possession of the property was ex-

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pressly secured to the debtors for three years, and they were allowed to sell on three years' credit, with no other restrictions than to pay the proceeds to the trustees, and there were other advances by the creditors. It has been several times held that a delay equivalent to the law's delay, is not unreasonable, and in *Roane et al. v. The Bank of Nashville*, 1 Head, 526, it was held upon the facts of that case a delay of five years did not avoid the deed, although the property was apparently worth greatly more than the debts. It was said, however, not to be unreasonable, as the property was bound by judgments and executions to a vast amount, and the debt secured a very large one, and on the whole the security was not unreasonable.

It is difficult to see why, upon the allegations of this bill the deed in question does not necessarily hinder and delay the unsecured creditors unreasonably as to all the land embraced in the deed, beyond what would have been ample security for the debts embraced in the deed. The debtor has no other property upon which they can go. The property conveyed was worth more than three times the amount of the debts secured. The complainants ought to have the right to reach all the land not necessary to secure the trust debts, and yet because they are included in the trust deed he is delayed in this relief for two years and six months, during which time the debtor enjoys the property.

The only answer to this is, that as the trust property is land the creditor may have the debtor's interest therein sold, subject to the deed of trust, and this remedy the creditor may have at once, and, therefore

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he is not hindered or delayed. If this be an adequate remedy, then the answer is sound, but it is evident that this remedy is not as effectual as if the land be unincumbered, and practically the incumbrance would generally operate to baffle and delay the debtor, and besides, upon the same theory this would be a good answer to an attack upon a deed fraudulent in fact. The defendant could say to the complainant, you are not hindered or delayed—you can sell subject to the deed.

Our conclusion is, that upon the allegations of the bill the deed of trust does, in law, operate to hinder and delay creditors. The argument for the complainant seems to concede that the defendant Ernest may, nevertheless, be entitled to priority, but of course we decide nothing as to this.

The result is, the decree of the chancellor overruling the demurrer will be affirmed, and the cause remanded. The appellant will pay the costs of this court.

Maloney v. Hawkins.

JAMES S. MALONEY v. D. S. HAWKINS *et al.*

WILL. Construction. Power. After providing for the payment of debts, etc., testator directs that his widow "shall control my real and personal property to the best advantage to raise and educate our children and to use what may be necessary for that purpose;" also, "that my children shall be made equal in the division of my estate, real and personal;" also, "that my children should all receive about the same in the way of education, and as they arrive at age that they be assisted out of my estate what she may think necessary, but not go beyond what would be their part," with special authority to the widow to convey certain tracts of land: *Held*, 1. That the title to lands did not pass to all the children, as tenants in common by inheritance, but passed to them by devise; and 2. The widow, as executrix, had power to convey the entire estate in any tract, under the restrictions imposed in the will.

FROM GREENE.

Appeal from the Chancery Court at Greeneville.
H. C. SMITH, Ch.

ROBINSON & MALONEY and H. H. INGERSOLL for complainant.

ROBERT M. MCKEE for defendants.

McFARLAND, J., delivered the opinion of the court

The complainant by his bill claims to be the creditor of the defendants, D. S. & John K. Hawkins, in the amount of six promissory notes, executed by them as partners, and all due at one day, all of which are exhibited with the bill.

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The specific object of the bill is to subject the undivided interests or shares of the said D. S. & John K. Hawkins in the lands of their deceased father, Dr. Joseph Hawkins, and also their interest in a tract purchased by his executrix after his death, under the power to do so given by the will. The several tracts are specially mentioned and described, and the position is assumed that as to these lands Dr. Hawkins died intestate. It is stated, however, that the executrix had conveyed two of the tracts to said John K. Hawkins, and he in turn had conveyed one of the tracts to Ezekiel Adams and the other to S. C. Ayres; that the first was really a sale by the executrix to said Adams, but the mode of conveyance referred to was adopted to avoid the terms of the will. It is charged that the executrix had no power under the will to make these conveyances, and that Adams and Ayres had notice of the terms of the will.

The bill further charges, upon information and belief, that said D. S. & John K. Hawkins have receipted the executrix for large sums and thus attempting to show that they received their *pro rata* of their father's estate, and he insists that this is a part of the scheme to defraud complainant out of his debt. The executrix, who was the widow, and also the other four children of the testator, and Adams and Ayres, together with D. S. & John K. Hawkins, were made defendants. The specific prayer is, that the undivided shares of said D. S. & John K. Hawkins in the lands be subjected to complainant's debts, and that the deeds re-

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ferred to be removed as clouds upon the title. No attachment was prayed for or issued.

The executrix and the other children answered and made defense, but the other defendants suffered judgments *pro confesso*.

The decree of the chancellor granted the relief prayed for, except that he held that the deeds of John K. Hawkins to Adams and Ayres vested each of these purchasers with the undivided one-sixth of the said John K. in said tracts respectively, but he held that said John K. still remained the owner of an undivided one-sixth of all the other lands, and the said D. S. is still the owner of one-sixth in all the lands, all of which are ordered to be sold, if necessary, to pay complainant's debt. The executrix and in behalf of herself and as guardian *ad litem* for the three infants, have appealed, and D. S. & John K. Hawkins have sued out a writ of error.

If the decree was so far final as to allow a writ of error—as it probably was not—still we think it clear that the question made in behalf of said D. S. & John K. as to the debts or notes sued upon not being due at the filing of the bill, is not well taken. The notes are all exhibited with the bill, and all upon their faces read “one day after date we promise to pay,” etc., which from their date would make them all due before the bill was filed, but they all have on the lower left hand corners and opposite the signature words in this form, “due January 1st, 1881,” “due January 1st, 1882,” etc., and according to these memoranda, there was only one of the notes due when the

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bill was filed; but the makers of the notes allowed judgment *pro confesso* to be taken, and did not make the question by answer or otherwise, as they might have done, whether these memoranda constituted part of the notes, as according to the allegations of the bill they did not: *Hatfield v. Griffith*, 1 Lea, 300. The other defendants did make the question in their answer, but it is a question in which they have no interest. If the decree below only had the effect to subject the individual interests of the two debtors in the lands mentioned to complainant's debt, without any adjudication binding upon the heirs or devisees as to the extent of those interests, it might be said that the other heirs and devisees would not be affected by the decree; but the decree adjudges that said debtors each own one-sixth of all the lands, except as to the two tracts as to which John K. has conveyed his interest. The decree does, therefore, affect the rights of the other heirs and devisees, and the correctness of the decree on this point must, therefore, be examined, and the determination of the question depends upon a construction of Dr. Hawkins' will.

It is to be inferred that at the date of the will and at the death of the testator, which occurred soon after, his children were all under age. The 1st and 2d items provide for the payment of the funeral expenses and debts. The 3d item is as follows: "3d. That after my debts are paid, my beloved wife Martha, so long as she shall remain my widow, shall control my real and personal property to the best advantage to raise and educate our children, and to use

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what may be necessary for that purpose." The 4th item provides, that the money he may be entitled to, arising out of a partnership with his two brothers, his interest in the lands of his deceased father, and in the lands of a deceased brother, and his interest in another tract specifically mentioned, purchased jointly⁴ by him and his two brothers, "be invested in good lands for my children." In connection with this, the 10th item provides that if the other parties owning a joint interest in the lands of his deceased father and his deceased brother, that is to say, the other heirs, think it best to make a private sale, and if his two brothers think it best to sell the other tract mentioned in the 4th item, then his executrix is empowered to join in all these sales and convey accordingly. The 5th item is as follows: "5th. It is my will that my children should be made equal in the division of my estate, both of the real and personal."

The 6th directs his lands to be so farmed as to improve them. The 7th is as follows: "7th. It is my will that my children should all receive about the same in the way of education, and that as they arrive at the age of twenty-one years that they may be assisted out of my estate what *she* may think necessary, but not go beyond what would be their part."

The 8th directs that the surplus stock or grain on hand the next fall be sold, and if not necessary for carrying on the farm, the proceeds to assist in making the last payment for a certain farm.

The 9th appoints his widow his executrix "to carry out my will," but provides in the case of her death

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or marriage, that his two sons, D. S. and John K., if twenty-one years of age, together with his brother William, shall be executors. This is, in substance, the whole of the will.

The answer of the executrix, filed in behalf of herself and the other children, sets up that under the powers given her in the will, and especially under the 7th item, she did assist the said John K. and Dudley S., upon their arriving at age, by advancing to them sums which they acknowledge to be their full share of the estate. Dudley S. received his share, \$1,700, on or before the 10th of January, 1877, which it is to be inferred was money or personal property; and by the 28th of December, 1876, said John K. had received his share, which included the two pieces of land conveyed to him shortly before. All this occurred before complainant's debts were created. Said parties acknowledged in writing at the time, the receipts to be in full of their share of the estate, and after this bill was filed, executed a formal relinquishment. The answer denies all fraudulent purpose in these transactions.

1st. We are of opinion that the testator did not die intestate as to any part of his estate. The presumption of law is that his purpose was to dispose of his whole estate, and the will may be so construed as to carry out this purpose. Whatever interest, therefore, Dudley S. and John K. took in the estate, was under the will and not as heirs.

2d. The testator intended that his whole estate should be kept together and managed by his executrix

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at least until the oldest child should arrive at the age of twenty-one—and as each child should arrive at age, the executrix was empowered to give or advance them out of the estate whatever she might think necessary, provided it did not exceed their part of the whole estate. This is in substance almost the language of item 7. It is true that the executrix is not in terms authorized, in carrying out this item, to convey them any part of the real estate. But there is no limit or restriction as to the part or character of the estate out of which they are thus to be advanced or assisted as they arrive at age. The language is, “they may be assisted out of my estate,” etc., and there is no reason to suppose that the testator meant simply that they might receive their share of the personal estate.

It is clear that under this clause the executrix might advance to the oldest child when he arrived at age, his full share of the whole estate, and to each of the others in succession—and this would in the end complete the division of the estate. It is further clear this could not be done without in some way disposing of the realty.

The record indicates that the executrix was able to advance one of the sons, on his arriving at age, his share in money or personalty, but being unable to advance the other in personalty when he became of age and called for his share, she conveyed him part of the real estate. While the 5th item provides that all the children shall be made equal, no other mode of division is indicated than that pointed out in the 7th item. The executrix is by this item given the

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power to advance each one of the children his full share, and this, if done, would result in a complete and equal division, and for the executrix to do this she must necessarily have the power to convey the real estate to the children. The power to do a particular thing includes the means by which it is to be accomplished.

But if it were even doubtful whether the executrix has the power to convey the real estate to the children, she undoubtedly has the power to advance them out of the personalty to the full extent of their interest in the estate, so long as she had the means to do so, and consequently the one so advanced would not be entitled to a full share of the real estate.

In short, we hold that each one of the children under the will is entitled to an equal share of the estate as a whole, and is to be charged with such parts of the estate as the executrix may have advanced them, whether of real or personal estate, under the provisions of the 7th clause, and the chancellor was, therefore, in error in holding that John K. and Dudley S. were specifically entitled to one-sixth of the lands. If the complainant had so framed his bill as to ascertain and appropriate the shares of his debtors in the estate, that relief might have been granted, provided they had not already received it, or provided he had shown that the allotment to them of their shares was fraudulent. This he has not done. The relief prayed is that said debtors be declared entitled absolutely and specifically each to an undivided one-sixth in the lands left by the testator, and that the

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same be sold for complainant's debt, and this relief, with the modification before indicated, was granted. This we hold was error, and upon the record as presented the only relief to which complainant has shown himself entitled is a judgment against the debtors, with an award of execution, and the decree will be accordingly.

One-half of the costs of this and the court below will be adjudged against D. S. and John K. Hawkins, and the other against complainant.

L. W. MCINTURF v. W. W. WOODRUFF & Co. *et al.*

HOMESTEAD. *Abandonment.* Removal from homestead, by one appointed to the office of jailor during the will and pleasure of the sheriff, to the jail, and occupation of it for a residence for a year, is not an abandonment of homestead.

FROM GREENE.

Appeal from the Chancery Court at Greeneville. H.
C. SMITH, Ch.

H. H. INGERSOLL for complainant.

R. M. MCKEE for defendant.

McInturf v. Woodruff & Co.

FREEMAN, J., delivered the opinion of the court.

Woodruff & Co. and McGaughey, Sons & Co. had judgments against complainant before a justice of the peace, on which executions issued, which were levied on a small house and lot in the town of Greeneville, which has been ordered to be sold by the circuit court under the levies. Woodruff & Co.'s judgment was had July, 1879, on a debt contracted in 1877—McGaughey, Sons & Co.'s debt was created in 1874, and judgment in 1877.

This bill is filed to enjoin the sale of the lot on a claim of homestead, based on the following statement: The complainant is the head of a family, resided on the place for ten years, but in the latter part of 1878, or early in 1879, was appointed jailor of the county, and removed to the jail, hard by, in order to give better supervision of the prisoners, as he says, during temporary repair of the jail. In the meantime the house was rented to a tenant from month to month—complainant using a shop on the lot as a gunsmith shop himself. He charges his change of residence was temporary, not intended to be permanent, and he never intended to abandon his homestead. He says he intended to return to his home as soon as the repairs were completed on the jail, and that he did return and occupy it during the year 1879. In the meantime it had been levied on by respondents.

The answers admit the facts as stated in the bill, except the intention to return soon to the homestead, but insist the homestead had been abandoned.

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The proof shows an occupation of the jail residence for about twelve months as jailor—and complainant swears his intention was not to abandon, but to retain his homestead, as his appointment as jailor was for no definite period—and as we know, is subject to the will of the sheriff.

It seems to be settled by our decisions, that a clear abandonment in fact will forfeit the homestead right. The case of *Roach v. Hacker*, 2 Lea, 635-6, was such a case, where the husband had left his wife and gone to Kentucky, and the wife had removed, leaving the mother of her husband in charge, and had remained in another county for three years. Abandonment is made out by the fact of leaving the possession, and the intention of the party so leaving, the latter to be shown by the acts of the party. We think with the chancellor, there was no abandonment in this case—only a temporary vacation of the possession, with intent to retain the home and re-occupy, which might occur at any time by dismissal from the position of jailor.

Respondents file their answer as a cross-bill, but simply to enforce their levies—nothing more. It was unnecessary. The remainder interest in the homestead is subject to the execution in future, but has not been levied on.

Affirm decree with costs.

Bramley v. Wilds.

THOMAS H. BRAMLEY v. HENRY A. WILDS *et al.*

OFFICIAL BONDS. *Liability of surety. Secret conditions.* Sureties on the official bonds of W. as clerk and master, after due notice moved to be discharged. W. procured P. to sign his name as a substitute surety, on the condition that others named would join. P. acknowledged the substitute bond before the chancellor, telling him at the time that others would sign, but not that his signature was void unless they did. The others did not sign; the bond was approved, the former sureties released, and W. remained in office. *Held*, that P. was liable as surety for all defalcations of W. after the date of his acknowledgment.

FROM GREENE.

Appeal from the Chancery Court at Greeneville.
N. HACKER, sitting as Chancellor by interchange.

A. B. WILSON for complainant.

ROBINSON & MALONEY, A. H. PETTIBONE and A.
N. SHOWN for respondents.

McFARLAND, J., delivered the opinion of the court.

The object of this bill is to recover of H. A. Wilds, former clerk and master of the chancery court at Greeneville, and his sureties on his official bonds, certain sums of money received by said Wilds under the orders and decrees in a former cause and afterwards decreed to be paid to complainant.

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Wilds was appointed clerk and master on the 19th of November, 1870, and at that time executed and delivered the several bonds required by law, with a number of sureties, which bonds were duly acknowledged and approved and entered of record, and Wilds inducted into office.

Subsequently two of the sureties, Elbert S. Ripley and Felix A. Reeve, gave Wilds notice to give new bonds in accordance with the provisions of the Code, sec. 735 *et seq.*, so as to release them. In compliance with this notice, the record of the court shows that on the 13th of November, 1874, Wilds executed three additional bonds in substantial accord with the statutory bonds, with D. T. Patterson, W. D. Williams and Thomas Weems as sureties, which were acknowledged before the chancellor in open court by the obligors, approved by the chancellor, and entered of record, and Ripley and Reeve declared discharged.

Wilds continued in office under these several bonds until the expiration of his term, November, 1876.

The money for which a recovery is now sought was paid to Wilds under orders and decrees pronounced in the case of Thomas H. Bramley (the present complainant) v. M. F. Miller and others, the date of the payments being as follows, to-wit: July 14th, 1874, \$400; December 8th, 1874, \$220; and January 15th, 1875, \$200. Of these sums Wilds subsequently accounted for \$100, but failed to pay over the remainder, either to his successor in office or to complainant, who by the final decree in that cause was declared entitled to the fund.

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D. T. Patterson, one of the sureties on the last named set of bonds contests his liability upon several grounds, but principally upon the ground that the bonds were executed and delivered by him with an agreement at the time that he was not to be bound thereon until a number of other sureties also became bound, which condition not being complied with, it is insisted on his behalf that no liability ever attached to him. This defense is set up by answer and special pleas, and the testimony of Judge Patterson, and of the presiding chancellor Smith, and also Wilds and Williams, was taken in relation to the facts transpiring upon the execution of said bonds. Conceding for the argument that the official act of the chancellor, showing the execution and acknowledgment of these bonds in open court, and the acceptance and approval thereof may be contradicted by parol proof showing the delivery of the bonds as escrows, only to take effect upon the conditions stated, still we think the averments of Judge Patterson's answer and plea, and the statements of his deposition fail in any aspect to sustain the defense. If the official act of the chancellor can be avoided at all, it must be upon proof sufficient to set aside the judgment of a court of record for fraud: See *Amis v. Marks*, 3 Lea, 568; *Burford v. Cox*, *Ibid*, 518. Judge Patterson's statement in his deposition—which is substantially the same as his answer—is in substance, that Wilds applied to him to become his surety, telling him at the time that Reese, one of his sureties, had given him notice to give a new bond. Wilds told him he expected to give new

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bonds, with *twenty good* men in the place of Reese—he named over the men he proposed to give, many of whom witness knew to be good and solvent men. Witness gives the names of some of the proposed sureties, but the others he had forgotten, but thinks there were at least twenty solvent men named. He then agreed with Wilds to become his surety on the bonds upon the condition that the persons named should also become sureties, and he would not have agreed to go on the bonds on any other conditions. He then asked Wilds if his other sureties were in town and he said he supposed not, but they would be in that day or the next. Witness told him that he was compelled to return home and would not be in town again during the term, but if the chancellor would take his acknowledgment that morning he would go on the bonds. Witness then went into the court-house and saw chancellor Smith on the bench, and told him he had agreed to become one of Wilds' sureties; that there was a number of others to go on the bonds, but Mr. Wilds had told him they were not in town, but would be on that day or the next; he told the judge that he was in a hurry to go home, and asked him as a favor to take his acknowledgment. The chancellor replied he would do so, and take the acknowledgment of the others as they came in. Williams and Weems were then in the court-house, and they with witness executed and acknowledged the bonds—the chancellor at the time saying to Wilds, “as your other sureties arrive, bring them in and I will take their acknowledgments.” Wilds replied in substance

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that he would do so—witness then immediately left. He says in substance elsewhere, that he left with the understanding that he was only to be bound upon condition that the other persons also became sureties; but he gives the actual transaction in the presence of the chancellor and what was then said and done, in substance as above. The chancellor's version of the transaction is, that he had previously been informed by Wilds that he proposed to give on the new bonds, as sureties (in the place of Ripley and Reeve) Patterson, Williams and Weems, and he, the chancellor, had agreed to take them; and when Patterson spoke of others signing the bonds, he supposed he had reference to Williams and Weems. About the time Patterson was executing the bonds, the chancellor discovered Williams in the court room and called him up and he also executed them, and before they were done, Weems also came in, and the bonds were executed and acknowledged by them. The chancellor not understanding that any other sureties were to sign them, and none others being offered, accepted them in that form. While Judge Patterson does prove distinctly that the conditions upon which he was to become surety on the bonds were agreed upon between himself and Wilds before they went into the court room, yet he does not prove that these conditions were stated in the presence of, or assented to by the chancellor. He only says that he told the chancellor that other sureties were to go on the bonds, and that the chancellor assented to this, but he does not say that the bonds were delivered by him and accepted upon this

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condition—the names or number of the other sureties were not mentioned in the chancellor's presence.

Whatever may have been Judge Patterson's understanding of the matter, it is clear from his own statements that he executed and acknowledged the bonds in such manner and in such terms as to justify the chancellor, if he chose to do so, in accepting and approving them unconditionally, and he having done so, it is clear the liability attached.

Besides, this enabled Wilds to continue in office upon the faith of these bonds, and he and his sureties are estopped to deny their validity: Code, sec. 774.

Again, the fact that Wilds did not disclose to Patterson that Ripley had also given notice and was being released by the new bonds, can be of no avail. The fact could have been ascertained upon proper enquiry, and besides, the law would charge the new sureties with notice. There is no ground upon which the defendant Patterson can be relieved from the liability.

The question, then, is, are Ripley and Reeve relieved from liability for the breach of their bonds accruing subsequent to the approval of the new bonds? They pursued substantially the provisions of the Code, sec. 785, *et seq.* The new bonds were accepted and approved by the chancellor, and the express provisions of sec. 790 of the Code is, that upon the execution and approval of the additional bonds, the applicant sureties are exonerated from all liability for breaches of their bonds subsequently accruing.

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That this does not affect the liability of the other sureties on the original bonds, either for previous or subsequent breaches, is also expressly provided by sec. 792.

It results that all the sureties on the original bonds are liable for breaches accruing previous to the approval of the new bonds, and that all of said sureties except Reeve and Ripley are liable jointly with the sureties on the new bonds for breaches subsequently accruing. This was the holding of the circuit judge, who heard in the cause as chancellor. And upon this theory Reeve and Ripley were held liable jointly with the other sureties on the original bonds for \$400 received by Wilds on the 14th of July, 1874, the court being of opinion that the default as to this sum had accrued previous to the approval of the new bonds on the 13th of November, 1874. This conclusion is sustained by the fact that in his official report of funds on hands made on the 11th of November, 1874, in accordance with the act of the 17th of December, 1869, Wilds gave no account of this money, although he had received it on the 14th of July previous. Not having been paid out or loaned, it should have been in his hands; and that it was not then in his hands, is sufficient evidence that he had converted it to his own use. The decree is not otherwise complained of as to the amounts.

Some technical questions are made in the record; and first, as to the refusal of the court below to continue the cause upon the affidavit of the defendant Patterson, but the affidavit only made a case for con-

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tinuance in the discretion of the judge, and it does not appear that there was any abuse of discretion or injustice done by the refusal.

Objections were taken to the reading from the records of the court the copies of the several bonds in question, with the approval of the chancellor as therein entered, counsel insisting that the original bonds should be produced, or certified copies from the office of the Secretary of State, where the originals are required to be filed by sec. 331 of the Code. We find no special provision as to whether the original or a copy shall be produced when the bonds are desired, and if a copy, whether the copy on the record or from the office of the Secretary of State shall be the better evidence; but in this case the execution of the bonds and their terms and conditions are all admitted, except the special matters set up in the answer and plea of Judge Patterson, and their production was not essential.

Upon the whole, we find no error, and the decree will be affirmed with costs.

Gentry v. Wagner.

RICHARD M. GENTRY v. J. H. & W. J. WAGNER.

SATISFACTION OF JUDGMENT. *Bid on land.* A judgment satisfied by the sale and purchase of land under it cannot be used in advancing the bid upon an execution sale of other land of the judgment debtor upon a mere averment that no title was acquired under the first sale, there being no averment or proof that the satisfaction of the judgment had ever been set aside and the judgment revived.

FROM JOHNSON.

Appeal from the Chancery Court at Taylorsville. H. C. SMITH, Ch.

H. H. INGERSOLL for complainant.

N. M. TAYLOR for respondents.

McFARLAND, J., delivered the opinion of the court.

A tract of land of eight hundred acres. belonging to the complainant, was sold on the 6th of July, 1868, under two orders of sale founded upon two small judgments, rendered by a justice of the peace against complainant, in favor of the firm of M. M. Wagner & Sons, and regular condemnation thereunder. At the sale N. J. Wagner, in behalf of the firm, became the purchaser of the land for \$29.25. On the day of the sale, said N. J. Wagner undertook to advance his bid

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the further sum of \$100, by crediting that amount on a judgment that Thomas Greer had obtained against complainant on the 11th of July, 1853, and which, on the 14th of July, 1853, Greer had assigned to M. M. Wagner. And on the 4th of July, 1870, said N. J. Wagner undertook to still further advance his bid to the full amount of the Greer judgment, in all \$482.49.

On the 28th of June, 1870, said N. J. Wagner received from complainant \$25, and on the 24th of March, 1871, \$24, in redemption. These sums were more than sufficient to pay, with interest, the original bid of Wagner of \$29.25, which was a satisfaction of the two small judgments in favor of M. M. Wagner & Sons, under which the sale was made.

The complainant failing to pay any further sum in redemption, M. M. Wagner & Sons on the 1st day of October, 1874, took the sheriff's deed for the land, founded upon the foregoing proceedings, and brought their action of ejectment. Thereupon the complainant filed this bill for a perpetual injunction.

The case turns upon the question whether the advance of his bid by N. J. Wagner, on the 6th of July, 1868, and again on the 4th. of July, 1870, by "putting on the land" the amount of the Greer judgment, was valid so as to give him or his firm the right to hold the land for the amount of this judgment in addition to his original bid.

Without noticing other questions, it will be sufficient to say that the record shows that after Greer's judgment had been assigned to M. M. Wagner, exe-

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cution was issued upon it and levied upon three tracts of land of the complainant, which were on the 7th of November, 1853, severally sold and purchased by said M. M. Wagner, who on the 19th of November, 1853, advanced his several bids so as to cover the whole of the judgment and costs.

It is averred in the answer in this case that Wagner acquired no title to said lands, but there is neither averment or proof that the satisfaction of the judgment had ever been set aside or the judgment revived. Hence it follows that this judgment was not subsisting at the time N. J. Wagner undertook to "put in" on the land in controversy in this case, by advancing his bid so as to cover it. It is, therefore, unnecessary to determine whether complainant in fact paid to Wagner the amount of the Greer judgment in redemption of the lands sold under it.

The decree of the chancellor in favor of the complainant is affirmed with costs.

Railroad v. Smith.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD
COMPANY v. SAMUEL SMITH.

1. **NEGLIGENCE.** *Employee. Charge of court.* In action by employee against railroad company for personal injury resulting from negligence in equipment of a hand-car, wherein contributory negligence was a defense, the following charge on that subject was held not positive error: "If the handle of the lever was defective, and such defect was known to the plaintiff, and he accepted, or continued in its service, using the same with full knowledge of the defects, he could not recover;" and "if the plaintiff might, by the exercise of ordinary care, have escaped the injury, he cannot recover."
2. **REVERSAL ON FACTS.** The Supreme Court will not disturb a verdict, "though the jury might well have found the weight of proof to be the other way."

FROM SULLIVAN.

Appeal in error from the Law Court at Bristol.
N. HACKER, J.

N. M. TAYLOR and W. D. HAYNES for Railroad.

BAILEY & McCROSKEY for Smith.

McFARLAND, J., delivered the opinion of the court.

This action was brought by Smith. In his declaration he avers that he was an employee of the railroad company as a "section hand," and while so employed received serious injuries in consequence of gross negligence and want of caution upon the part of the company in respect to a defect in the machinery and equipping of a hand-car placed on the road for the

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use of the "section hands," which defect was known to the company, or might have been known by proper diligence.

The facts as deposed to by the plaintiff and others, are in substance that at the close of the day's work on the 2d of June, 1881, the plaintiff and the other section hands, in obedience to the orders of the "section boss," put the "tools" on the "hand-car" or "lever-car," and started with it to the tool chest, while moving in that direction and while plaintiff was standing on the front of the car and working one end of the lever, the handle broke, throwing him off in front of the car, which ran over him, injuring him badly. The handle was of wood and had been in use about a month. One witness says he examined the handle that was broken and he thought it looked "doaty" in the centre, or had something like a "dry rot," though he did not examine it carefully.

For the defendant the section boss proves that he examined the handle after it was broken, and it was perfectly sound—it was made of "red hickory," by one Beedleman. Beedleman proves that he made it, under a contract to make handles for the company, that it was cut from a "white hickory" tree, and was sound. He says, however, that it was one and a half inches in diameter where it went through the socket, and thinks it ought to have been larger to make it safe. He helped put in the handle but did not test its strength otherwise than by his eye. There was proof tending to show that at the time of the accident, the hands were endeavoring to run the car rapidly, so as

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to get out of a shower of rain. Plaintiff had been in the employ, "off and on," for six years, most of the time as a "section hand."

The charge of the judge is made up, to a great degree, of extracts from various opinions of this court on kindred questions. It embraces some matters not strictly applicable to the facts of the case, but probably not misleading. Several propositions were submitted by the counsel of the defendant, which the court declined to give, except so far as embraced in his general charge. Without noticing these in detail, it is only necessary to consider whether there was any material error in regard to the vital and turning points in the case.

The only defect in the car attempted to be shown, was in the handle of the lever. The defects in the handle were, that it was made of unsound wood, and was too small. As to the first defect it was insisted for the company, that it was not responsible for latent defects when the article was purchased from a manufacturer. The rule as established in *Railroad v. Jones*, 9 Heis., 27, is, that a railroad is not responsible for the negligence of a manufacturer from whom it purchases machinery. That if the defect be such as could not be discovered by the company upon application of the proper tests, then it would not be liable, although the manufacturer might have discovered the defects. The judge's charge on this point is in the language of Judge Nicholson, in the case referred to. It required no special skill or scientific knowledge to test the strength of a wooden lever or handle like the one described.

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In respect to the defect in the size of the handle, the controlling question, undoubtedly was, whether or not the plaintiff had as full knowledge of this defect as any one else, that is to say, whether he could not see the size of the handle, and may be supposed to have as sound judgment as to the probable strength of a handle of that size as any one, as the determination of such a matter required no special knowledge or scientific skill, and if with such knowledge, the plaintiff elected to continue in the service, he would be regarded as voluntarily electing himself to take the risk?

This is the principle of the case of *Railroad v. Hodges*, relied upon by the counsel of the company. Upon this point the judge charged the jury "that if the handle of the lever-car was defective, and such defect was known to the plaintiff, and he accepted service, using the same, or continued using the same with full knowledge of the defects, he could not recover," and again, "if the plaintiff might, by the exercise of ordinary care, have escaped the injury, he could not recover."

The special requests on this point were not more directly applicable to the facts than the charge above given, in fact, the special requests on this point are somewhat more general than the language of the charge.

There is, therefore, no positive error in the charge or in the refusal to give the further instructions asked. The question then arises whether there is evidence to support the verdict?

So far as the defect in the size of the handle is concerned, it is apparent that the plaintiff had full

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knowledge and was as capable of judging the strain a handle of that size would probably bear, as any one else, and with this knowledge he continued its use at his own risk. The principle of the *Railroad v. Hodges* case, directly applies.

The verdict, then, must rest upon the proof that the handle was not of sound wood, and that this might have been discovered by the employees of the company who put it in, by reasonable care or testing its strength, and there is proof to this effect, and although the jury might well have found the weight of proof to be the other way, yet, under the rules of this court we cannot disturb the finding.

The judgment will be affirmed.

JESSE CROSS v. JAMES SWEENEY *et al.*

COUNTY LINE. *Establishment by commissioners.* The correctness of the action of commissioners to "re-survey and establish the line between two counties," cannot be impeached in a private suit to which the counties are not parties. And, it seems, such action is conclusive upon the owners of wild land bounded upon such line.

FROM SULLIVAN.

Appeal from the Chancery Court at Blountville. H.
C. SMITH, Ch.

Cross v. Sweeney.

W. V. DEADERICK for complainant.

C. J. ST. JOHN and H. M. FOLSOM for respondents.

FREEMAN, J., delivered the opinion of the court.

Complainant and defendant own tracts of land, the former in Sullivan, the latter in Carter counties. Both titles in their deeds call for the line between the counties of Carter and Sullivan, and to run with said line. The lands are mountain lands and unimproved. Complainant had cut and prepared a lot of cross-ties on what he assumed was his land.

The Legislature of 1871, authorized certain commissioners to "re-survey and establish" the line between the two counties—which they did, and filed their report as required by the statute. It turns out that the cross-ties were on the Carter county side of this line, and have been appropriated by defendant as his property.

This bill is filed attacking the correctness of the action of the commissioners, and insisting they did not correctly establish the line.

We take it to be too clear for argument, that this cannot be done in a private suit between individuals, as is here presented. We cannot undertake to settle the correctness of the action of the commissioners acting under authority of an act of the Legislature, incidentally, while the real parties concerned, to-wit, the two counties, are not before the court.

The chancellor so held, and we affirm his decree with costs.

Railroad v. Kyle.

ROGERSVILLE & JEFFERSON RAILROAD COMPANY v. W.
C. KYLE *et al.*

1. RAILROAD. *Effect of sale of, to enforce State's lien.* The effect of the sale of a delinquent railroad at the suit of the State to enforce its statutory lien, was to transfer the title of the road and its appurtenances and corporate franchises to the purchaser, and, unless the company was the purchaser, to dissolve the corporation.
2. CORPORATION, DISSOLVED. *Suit by.* A suit in the name of a corporation thus dissolved, brought more than five years after dissolution, cannot be maintained unless it appear that, under Code, sec. 1496, the chancellor has granted further time for closing the business of the dissolved corporation.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville. H.
C. SMITH, Ch.

W. P. GILLENWATERS for complainants.

KYLE & McDERMOTT for defendants.

McFARLAND, J., delivered the opinion of the court.

This bill was filed on the 14th of November, 1879, in the name of the "Rogersville & Jefferson Railroad Company," and in the name of the State for the use of said corporation, to hold W. C. Kyle, former president of the company, liable for large sums of money alleged to have been received by him on behalf of

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the company, between the years 1865, and October, 1867, and also for other large sums alleged to have been received by him while acting as receiver of the road, between the years 1870 and 1873; all of which it is charged, were unaccounted for. The other defendants are either the sureties of Kyle, on his bond as receiver, or persons to whom it is alleged his property has been fraudulently conveyed.

The Rogersville & Jefferson Railroad Company was one of that class known as "the delinquent railroad companies," that is to say, one of the companies to whom the State had loaned its bonds, retaining for security a lien on the road and its property. And the company having failed to meet the interest on the bonds loaned to it in accordance with the laws under which the loan was made; the road, with all its fixtures, rolling-stock, etc., together with the franchises of the company, has been sold under proceedings authorized by law instituted in the chancery court at Nashville, since which sale the original company has ceased to have any interest in the road.

In the aspect the case now comes before us it is conceded in argument that only two questions are presented for our consideration. And first, whether, at the commencement of this action, "The Rogersville & Jefferson Railroad Company" had a corporate existence so as to authorize the prosecution of this suit in its name? This question was properly made by a plea in abatement setting forth the facts upon which the question arises.

The second question is, whether or not the right

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of action arising upon the facts set forth in this bill passed to the purchaser of the road and is now vested in the present owner, or does it remain with the original corporation?

The special chancellor dismissed the bill upon the latter ground, but it is conceded that if either of these questions be decided for the defendants, the decree should be affirmed, otherwise it should be reversed and the cause remanded for further hearing by the chancellor upon the merits.

And first, did the Rogersville & Jefferson Railroad Company have a corporate existence for the purpose of instituting and prosecuting this suit? The sale of the road under the proceedings referred to occurred on the 20th of March, 1872. It was purchased by certain individuals, but by their direction and at their request, the title was by the decree of the court vested in the "East Tennessee, Virginia & Georgia Railroad Company," another corporation. This latter company subsequently sold and by deed conveyed all the right and title acquired under its purchase to one W. P. Elliott, and he in turn sold and conveyed to H. M. Aiken, who has since owned and operated the road.

The proceedings instituted in the chancery court at Nashville, under which this and other roads were sold, were specially authorized by certain acts of the Legislature, vesting that tribunal with exclusive jurisdiction to determine all questions that might arise touching the rights of the State, and also of the stockholders, bondholders, creditors and others; to define what should be the rights of the purchasers, and what should be

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the reserved rights of the companies, stockholders and others, as against the purchasers after the sale.

It was accordingly adjudged, among other things, that the lien of the State was superior to all other claims whatsoever, and that the lien extended to the road its rolling-stock and other property, rights, privileges and franchises, and that upon a sale to any one other than the original company, said companies and their stockholders would cease to have any right, legal or equitable, in the property rights or franchises so sold.

Passing for the present the question whether this sale transferred to the purchaser *debts due to the corporation*, we will consider whether the sale had the effect to terminate the corporate existence so as to prevent a suit in the corporate name to collect the debt. If it had been merely a sale of the stock owned by the stockholders, the corporate existence would not have been thereby terminated, even though the stock had all been purchased by one person, and even though this would have practically operated as an entire change in the beneficial ownership. But the effect of the sale under the proceedings referred to, was to transfer the title of the road and its appurtenances with the franchises granted by the charter for operating the same *from* the "Rogersville & Jefferson Railroad Company," and vest the same in the purchaser, the purchaser being in law another person. It is clear, therefore, that the purchaser is not a continuation of the original corporation, and so we have virtually held at the present term in respect to this sale in the case of *Ragan & Buffet*

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v. *Aiken*. After the sale the original corporation ceased to be the owner of the road, or any of its tangible property or appurtenances. The stockholders no longer owned any stock in the company, for the lien of the State extended to the stock, and it was expressly adjudicated in the case referred to, that upon a sale to any one other than the original company, that the stockholders should cease to have any interests. The franchises and privileges granted by the charter no longer remained with the corporation, for these, by the express terms of the decree, passed to the purchaser. Hence, the corporation no longer owned any road, or any part of the tangible property appurtenant thereto, its stockholders no longer owned any stock in the company. They could not acquire other stock, or construct another road, for the benefits of the charter were transferred from them to the purchaser. For all the practical purposes of its original creation, the corporation, therefore, ceased to exist. A corporation possessing neither property, rights or franchises, is scarcely conceivable. "A corporation, however, is not dissolved by mere non-user or assignment to others in whole or in part of its powers, franchises and privileges, unless all the corporate property has been appropriated to the payment of its debts": Code, sec. 3431. "And," the section continues, "any creditor or stockholder may file a bill under the provisions of the chapter, have the property applied to the payment of the debts, and the surplus divided among the stockholders." Whether this means that in such case the corporation may still continue to act as such and sue in its own name, with-

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out limit of time, or merely that it is not dissolved so as to defeat all rights of the creditors or stockholders to reach the assets, need not be considered. Inasmuch, however, as the remedy specially pointed out in such cases is by bill in equity by a creditor or stockholder, the latter construction might be given to it. But independent of this statute the remedy in equity to administer the assets of a dissolved corporation is ample and clear: See *State and Watson, v. Bank of Tennessee*, 5 Baxt., 101.

But it will be observed that the above section only in terms applies to cases where the powers, franchises and privileges of the corporation have ceased to be used or been transferred to another, leaving at least some part of the property unappropriated to the debts.

In the present case not only have the powers, franchises and privileges of the corporation been transferred to another, but all the corporate property and the right of the stockholders therein, unless it be this claim in the nature of a debt due to the corporation, and it is not alleged that any debts remain owing by the corporation—nor is this a bill by either a creditor or stockholder under the provisions of the Code referred to, to collect and administer the assets of the corporation as therein provided.

If anything remains to the original corporation, it is merely the right to collect the sums alleged to be due to Kyle in the nature of a debt due to the corporation, and for this purpose to institute a suit in the corporate name.

Upon the assumption that this debt did not pass

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to the purchaser, but remained with the corporation, it may readily be conceded that a court of equity could grant relief at the suit of a creditor or stockholder.

The question how long a dissolved corporation may yet be continued in existence merely for the purpose of prosecuting and defending suits is provided for in another part of the Code.

All corporations whose charters expire, or are annulled or dissolved, continue to exist as corporate bodies for the term of five years for the purpose of prosecuting and defending suits, settling up their business, disposing of their property and dividing the capital stock, but not for the purpose of continuing the corporate business: Code, sec. 1493. At the dissolution, the *managers of the business at the time*, by whatever name known, are trustees of the stockholders and creditors, unless some other persons are appointed trustees by the General Assembly, or by a competent court, and are authorized to settle the affairs of the corporation: Code, sec. 1494.

Such persons, that is, the acting managers of a corporation at the time of the dissolution, and who thereby become trustees under the above provisions of the Code, have the right to sue for and recover the debts of the dissolved corporation in its corporate name, and are jointly and severally responsible to its creditors to the extent of the property which may come into their hands: Code, sec. 1495. And, upon application to a chancellor, and making a proper case, the power of such trustee or receiver may be extended beyond the

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period of five years for the purposes named: Code, sec. 1496.

From these sections it is clear that a suit may be brought and prosecuted in the name of a dissolved corporation for the purpose of collecting a debt due to it, for the period of five years after dissolution. The persons authorized to thus use the corporate name are the managers of its business at the time of dissolution by whatever name known who thereby became trustees, or a trustee or trustees duly appointed by the General Assembly or a competent court. Such trustees have the power to thus use the corporate name for the period of five years, or to have the time extended beyond that period under section 1496 of the Code. Unless this be done their powers terminate at the end of five years from dissolution, and no one else would be authorized to sue in the corporate name.

Beyond the provisions of this statute there is no modification of the technical common law rule that upon dissolution of a corporation all suits by or against it abate: 5 Baxt., 101. But as we have seen, this does not deprive the creditor or stockholder of his remedy in his own name in equity.

The question who authorized the institution of the present suit in the corporate name was not made in the court below by rule upon the solicitor to show his authority, but it appears that the bill was filed more than five years after the sale of the road and its franchises and its consequent dissolution, and it not being alleged that the powers of those persons who, under the above provisions of law became trustees,

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were extended beyond that period, it results that they were not thus authorized to sue in the corporate name, and of course no one else had the authority.

The corporation was, in the view we have taken, dissolved upon the sale in 1872; leaving, so far as appears, at most, only this debt due to it, and we hold that so far as appears, no one was authorized to institute the present suit in the corporate name, and the remedy, if any, would be in the name of a creditor or stockholder.

This relieves us from the necessity of determining whether this claim or debt, with the right to sue for its collection, passed to the purchaser at the sales referred to, a question about which there may be some doubt.

The decree dismissing the bill will be affirmed with costs.

JAMES H. WILCOX v. HENRY A. MORRISON *et al.*

1. CHANCERY PLEADINGS AND PRACTICE. *Trusts. Local jurisdiction.* A chancery court in Tennessee has jurisdiction at the suit of a maker of a trust deed who resided in Virginia, where also the beneficiaries and trustee resided and the realty conveyed was situated, to administer and execute the trust, when a chose in action in Tennessee was embraced in the trust and it appears that it is the only part of the trust fund remaining undisposed of.

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2. NOTICE. *When presumed.* A judgment debtor, who becomes surety for the prosecution of a suit to enjoin the judgment against him, will be presumed to have notice of its assignment, when the fact of assignment is alleged in the injunction bill.
3. ERRONEOUS DECREE. *Collateral attack.* A decree between co-defendants in a chancery suit cannot be collaterally impeached by original bill because it was erroneous and reversible on appeal.
4. FOREIGN DECREES. The decrees of courts of a sister State touching the executing of such a trust *pro tanto*, will be respected and allowed to stand, unless it clearly appear that they are fraudulent.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville.
H. C. SMITH, Ch.

J. B. HEISKELL and KYLE & McDERMOTT for complainant.

F. M. FULKERSON for respondents.

DEADERICK, C. J., delivered the opinion of the court.

The complainant executed to defendant Morrison's predecessor a trust deed on land in Virginia, and some notes, one of which was for \$981, on Phipps and R. G. Netherland, of Hawkins county. It was stipulated in the trust deed that the maker of it had given to H. S. Kane an order on Phipps and Netherland for \$540 of the note, which was to be first paid if accepted.

The deed was made to secure judgments defendant Mann had obtained against complainant, and the order of \$540 was also given in satisfaction of judgments Kane had obtained against complainant.

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The judgment in favor of Mann was about \$2,000. But upon bill filed in Virginia by complainant, Mann's judgment was declared void, and upon his cross-bill he was allowed the benefit of the trust deed for about \$900, which, upon an account taken, was ascertained to be the true amount of the indebtedness of Wilcox to Mann. Kane's judgment was also declared void by a Virginia court, but he insists that the order, it was afterwards agreed between him and Wilcox, should stand and be in full force, that being the amount due to him from Wilcox.

The note of \$981. was delivered to Morrison, the trustee, or assignee, by the maker of the instrument at the time of its execution.

Suit was brought by the trustee in Hawkins county circuit court, and judgment recovered against Netherland in January, 1875, for \$1,714.58. On the 10th of May, thereafter, Netherland enjoined this judgment, but his bill was dismissed in November, 1875, and decree rendered against him and his sureties.

Complainant filed his bill praying that the original trustee, and Morrison as receiver and successor, be required to settle their accounts, and show what they have received and disbursed. It is charged that the trustee sold the land and applied to Mann's debt, and perhaps sold other trust effects, and that it will be necessary to have an account with both trustees to ascertain whether there is any balance due said Mann.

It is charged in the bill that the debt due Mann has been almost, if not entirely paid, that said deed of trust is fully discharged, and that the complainant

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is entitled to have and receive the proceeds of the judgment obtained against Netherland by said Morrison.

The bill also charges that he owes Kane nothing upon his order, which was given for the amount of the judgment Kane obtained against him, which was subsequently declared void by the Virginia court, yet, it is charged Kane claims that he is entitled to have the amount of the order satisfied out of the Netherland judgment or decree, and has managed and controlled the suit against Netherland and is seeking to enforce the collection of the debt, that he may apply it to the payment of his said order, and if not restrained will apply the money belonging to complainant to his unjust and unfounded claim.

An injunction is prayed for to restrain Morrison and Kane from the collection of said judgment against Netherland, until it can be judicially determined to whom said judgment belongs.

The bill makes Netherland, Kane, Morrison and Mann, and the sheriff defendants. The two defendants, Morrison and Kane being residents of Virginia demur, because the trustee and effects are in Virginia, and the trust is being administered in the courts of that State, and no allegations against the trustee are made, and complainant is fully protected in his bond, etc. The demurrer was overruled and defendants allowed to answer.

The demurrer was properly overruled. The only fund remaining undisposed of is a judgment in the courts of Tennessee, and complainant alleges that the trust debts are nearly or quite paid, and seeks to pro-

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tect the residue of the trust fund from misapplication and have the trustees to account. •

On the 1st of January, 1879, complainant filed an amended bill charging that one Wm. H. Burns, the lawyer who had represented him in having the judgments of Mann and Kane declared void, had filed a bill in Virginia to collect fees due him from complainant, and had obtained a decree in his favor, and had colluded with Kane in consolidating his case against complainant with complainant's case against Mann, which was still on the docket, and had allowed Kane to have a decree against complainant for the \$540 order, although he had charged in his bill that Kane's judgment was set aside as void, and complainant owed him nothing, and Kane, in his answer to Burns' bill had admitted that his judgment had been declared void. The amended bill charges he was not made a party to said bill of Burns, and had no notice of said decrees which were rendered in May and March, 1873, which ordered the Kane order to be paid out of the Netherland and Phipps debt. The amended bill prays that said decrees be declared void, having been obtained by fraud and collusion, and that the Netherland debt be declared to belong to complainant, less, whatever, if any, of it may be required to pay any balance due Mann.

Burns' bill was filed in the same court in which complainant's bill against Mann and others was filed, and in this bill last named, an account had been taken to ascertain what balance was due Mann. And Kane was made a defendant and his claim impeached; com-

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plainant was served with personal notice, and was regularly before the court, but he made no defense, to Burns' claim,⁹ and a judgment *pro confesso* was taken against him.

Kane answered Burns' bill and admitted that his judgment had been declared void for want of jurisdiction in the court that rendered it, but insisted that complainant, Wilcox, owed him the amount, and he had not sought to obtain another judgment, because he, Wilcox, had settled it by his order, and insisted he was entitled to receive the amount out of the first money collected by the receiver of the Netherland debt.

At the May term, 1873, the causes of Wilcox v. Mann, and Burns v. Wilcox and others, were consolidated and heard together by consent, and it was adjudged that Burns had established his debt against Wilcox, and the land was ordered to be sold for the satisfaction of Mann's debt. At the May term, 1873, a further decree was rendered, in which it was recited that Kane produced and filed his answer to the bill of Burns, and that plaintiff, Burns, conceiving that the answer of Kane sets forth the facts connected with Kane's claim of \$540, declines to reply to it, and that in the case of Wilcox v. Mann a report was made showing the amount due Mann, and that the deed of trust, and Wilcox's answer in that case, shows the amount of the \$981 note assigned by Wilcox to Kane, which evidence was considered in the case of Burns v. Wilcox and others, the decree reciting that by consent of all the parties at a former term, the

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two causes were consolidated, and are now heard together by consent of Burns, Kane and Mann.

The court then proceeds to declare it is unnecessary to take an account to ascertain the amount due to Burns or to Kane, "because Wilcox does not pretend that the whole of the \$540 and its interest is not due to Kane."

The decree then declares that Kane is entitled to be paid the whole of his debt by the trustee out of the first money received on the Phipps and Netherland debt. And said trustee is ordered to collect this debt as soon as possible, and pay the said Kane debt and interest thereon from the date of the trust deed. The decree, at its conclusion, recites that James H. Wilcox was not represented by counsel at this term of the court. But these causes were, at the last term consolidated, while he was represented by counsel, and the decree of the 10th of May, 1873, entered in the two causes, was then entered by his consent, given by his counsel in the case of Wilcox v. Mann.

In March, 1875, another decree in said two causes was rendered, reciting that judgment had been recovered by the trustee on the Phipps and Netherland note, and that Kane did not want his share of it to go into the hands of the receiver, who was appointed to execute the trusts, the trustee being removed, it was accordingly so ordered.

In October, 1879, J. C. Stamps filed his petition in this case, claiming that Wilcox had assigned him his interest in this suit and in the Netherland judgment, and exhibits the assignment dated 2d of Janu-

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ary, 1879. He avers that he is entitled to have said debt because he first gave notice to the debtor, and prays to be made a party to the end that he may assert his claim. He was made a party. On final hearing the chancellor held, and so decreed, that the decrees allowing the Kane debt against Wilcox, rendered in August, 1873, and March, 1875, in the consolidated causes, were obtained by fraud and should be vacated and annulled. He further held that Stamps, as assignee of Wilcox, was entitled to the recoveries against Netherland, except as to any balance due Mann and the debt due Burns, and ordered accounts as to these debts.

Kane having died pending this suit his administrator was made a party, and he and Stamps have appealed. Kane's administrator appeals because his intestate's claim is disallowed, and Stamps, because Burns' claim is allowed. No objection being taken to the payment of any balance, if any, which may be found to be due to Mann.

Burns' bill was filed in January, 1873, and prays to have the \$981. note attached for the satisfaction of his debt, and to have Morrison, the trustee, enjoined from paying out any sums paid him thereon, and he makes the trustee and Wilcox, the debtor, defendants to his bill.

The obligation of Phipps and Netherland is described in all the pleadings and the evidence, as a note for the payment of money, and is negotiable paper. To such paper the rule as to notice does not apply. The

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note was not only assigned, or conveyed, but it was also delivered to the trustee.

While he held it Burns filed his bill, and Wilcox and his trustee were parties to that bill, and Wilcox's subsequent assignment of his interest in this note and in this suit, would only convey such interest as he had at the time, subject to the prior rights acquired by his creditors. And it makes no difference that the note had been reduced to judgment before the assignment to Stamps.

But if notice was necessary, it is manifest from this record, that Netherland had such notice from the filing of this bill, April 10, 1876, if not before that time. He is made a defendant to the suit to enjoin the collection of a judgment rendered upon the note in January, 1875, in favor of Morrison, trustee, against said Netherland. And Netherland becomes the surety of Wilcox for the prosecution of this suit, although a defendant thereto. It is not probable that the judgment could have been taken against him by the trustee, without his knowing the character of his claim to the note sued on—much less is it probable that he would have become the surety for the prosecution of a suit against himself without fully understanding the contents and objects of the bill.

This bill disclosed the fact of the assignment of the note for the benefit of Mann and Kane. It did not impeach its validity as a security for Mann's debt, but insisted that it was nearly if not quite paid. It did impeach Kane's claim, and it was to be relieved of this that the bill was mainly filed. In an amend-

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ment it also impeached the decrees obtained by Burns and Kane against him.

Complainant alleges that he was not served with process or otherwise brought before the court at the suit of Burns, being a non-resident of the State of Virginia, and asks in his amended bill that Burns' decree be set aside and declared void for this reason. But it appears that publication was made, and afterwards process personally served upon him, and that he made no defense to the bill, and decree was entered against him upon his notes to plaintiff, exhibited with the bill May 8, 1873.

Afterwards, at the same term, May 8, 1873, the causes of Burns v. Wilcox and Wilcox v. Mann, were consolidated, and at August term, 1873, the decree complained of in favor of Kane, was rendered.

We are of opinion there is no valid objection to the decree in favor of Burns, and that he is entitled to its satisfaction out of the Netherland debt.

It is argued that the decrees in favor of Kane were fraudulently obtained and are null and void. The bill of Burns made Mann, Kane, Wilcox and the trustee, parties. It was filed in January, 1873. It declared that Kane's judgment, upon which his order was predicated, had been declared void, and so Wilcox should not be required to pay it.

In August, 1873, Kane filed his answer, insisting that it was settled between him and Wilcox, that the order should stand for the original consideration for which said judgments were rendered. Burns' name is signed to this answer as solicitor for Kane. Upon the

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22d of August, 1873, Burns admits that Kane's answer sets forth the facts in relation to the \$540 order, said decree is then entered, giving Kane prior right of satisfaction out of the Netherland note, and in March, 1875, a similar decree is entered, directing the trustee to collect the note and pay into court, except the amount due Kane.

The theory of the bill is, that Burns and Kane colluded together to obtain a decree in favor of the latter, against Wilcox. And that Burns having obtained the decree declaring Kane's judgment void, because the court rendering it had no jurisdiction of the case, was under special obligations to protect his former client. And such, it seems, were his feelings when he filed his bill against Wilcox to collect debts due from him, for he insisted in that bill, that Kane's order was given under the mistaken opinion that he had valid judgments to that amount, and insisted that the judgments being void, the order for their payment should be held void also.

Burns' deposition was taken and he states that after he had succeeded in reversing the judgments in favor of Kane, he and Wilcox conferred together as to the propriety of taking measures to vacate the order. The witness informed Wilcox that Kane could sue and recover upon the original liability and put him to costs, and would probably recover more than \$540, and advised him, if Kane would agree to it, to let the order stand as a final settlement, and not to seek to disturb it. He agreed to do it if Kane would, and saw

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Kane and he agreed to it, and so told Wilcox, and he agreed to it.

Wilcox denies that any such conversation ever took place. If it did, it sufficiently explains the reason why Burns' debt should be first satisfied. There appears to be no reason why Burns should enter into such a combination as that charged against him. Wilcox does not deny the justice of his claims, or make any defense against them. He stood in his case in antagonism to him and to Kane, and in order to reach the Netherland debt it was necessary to determine whether he or Kane had the right first to be satisfied out of it. It was about all of the trust property still remaining unappropriated, and the trust deed gave Kane the priority in respect to said Netherland debt, and we cannot say that the facts of the case warrant the charges made in the amended bill.

The decree in favor of Kane against Wilcox, who were co-defendants to Burns' bill, may have been reversed upon appeal or writ of error. But it was not absolutely void. The court had jurisdiction of the parties, and the subject-matter.

We are satisfied Wilcox owed Kane the amount of the order. Netherland and Stamps had full knowledge of Kane's claim and the assignment to him before Stamps obtained this assignment of Wilcox.

Stamps is only entitled to whatever interest Wilcox might have had after the charges of Mann, Kane and Burns have been satisfied.

The chancellor's decree as to Kane's claim will be reversed, and with this modification the decree below

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will be affirmed, and the appellant, Stamps, will pay the costs of this court, and the cause will be remanded for the taking of an account and for further proceedings.

N. T. SIMERLY, Ex'r. v. WILLIAM HURLEY *et al.*

CONTESTED WILL. *Reversal on facts.* The will of a sane old man, made seven years before his death, whereby the estate is given to his widow for life, should not be disturbed merely on the ground that her will was stronger than his, and that in other trivial matters she had occasionally controlled his actions; and the Supreme Court will reverse the judgment of an inferior court, setting aside a will, based on a verdict found only on such slight circumstances.

FROM CARTER.

Appeal in error from the Circuit Court of Carter county. N. HACKER, J.

TAYLOR, ST. JOHN & FOLSOM for plaintiffs in error.

THOMAS CURTIN for defendant.

McFARLAND, J., delivered the opinion of the court.

Reluctant as we are to disturb the judgments of inferior courts founded upon verdicts of a jury upon the ground that they are not sustained by evidence, we are, nevertheless, constrained to do so in this case.

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The bill of exceptions purports to set out all the evidence heard upon the trial. In our opinion it does not sustain the verdict. It is a contest over the will of Righly Moreland, deceased, and the jury have found against the will. The proof is conclusive that at the making of the will the testator was of sound mind and disposing memory. There is really no proof to the contrary. The will was executed and attested in the statutory form, and there is no room to doubt that the testator, at the time of its execution, fully understood its contents. The only ground of contest shadowed forth in the proof is, that at the making of the will the testator was advanced in age and enfeebled by disease, and that he was under the influence of and subject to the superior will of his wife, who was well, healthy and vigorous, and in whose favor the will was in part made. The proof of these facts rests mainly upon the testimony of the contestants, but even in their testimony, there is nothing to show that in the matter of executing the will the testator's wife attempted to exercise the slightest influence over him, although there is some proof, that in other trivial matters on a few occasions, she was allowed to control his actions.

The will was executed nearly seven years before the testator's death. He was not enfeebled to such an extent as materially to affect the force of his will or the capacity of his mind. He was able to go about and attend to his business for several years afterwards.

He disposed of a small estate worth about \$1,500,

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giving it to his wife for life, with remainder to three grand-children, the children of a deceased son, whom he had raised at his house since the death of their father, to the exclusion of several daughters, all of whom were of mature years and who had married and left him. We have searched in vain in this record for the evidence which could have justified the jury in finding that this was not the will of the testator, freely and voluntarily executed.

Let the judgment be reversed and the cause remanded for a new trial.

R. R. SWEPSON v. EXCHANGE & DEP. BANK *et al.*

AND

FIRST NAT. BANK OF N. Y. v. EX. & DEP. BANK *et al.*

1. CHANCERY PLEADING. *Multifariousness.* A bill by a judgment-creditor of an insolvent bank, whose sole stockholder is personally liable for its debts, is not multifarious for seeking to obtain satisfaction by setting aside a fraudulent conveyance by the bank, recover judgment against the stockholder, and set aside fraudulent conveyances by him, and also remove a cloud cast on title by the fraudulent conveyances.
2. SAME. *Creditor's bill.* An objection that a creditor of an insolvent corporation files his bill for his own use only, is obviated by the fact that the suit has been consolidated with another filed for all creditors.
3. FRAUDULENT CONVEYANCE. *Fraud in law.* A trust-deed is not fraudulent on its face because no time is specified for the sale of the prop-

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erty conveyed; and the trustee, a young man without property, and excused from bond, is authorized to rent until sale; and allowed to sell on credit in his discretion; and to compromise or arbitrate any matter of litigation; and do all other proper and necessary acts as fully as could the grantor; and the amount of the preferred debts is not specified.

4. REGISTRATION. *In what book?* A trust-deed conveying realty is notice to the world, when properly acknowledged and noted for registration, though it be registered in the chattel-mortgage book.
5. INSOLVENT BANK. *Conveyance by, void.* Assets of an insolvent bank are trust-funds for the creditors, and a conveyance thereof is fraudulent and void.

 FROM KNOX.

Appeal from the Chancery Court at Knoxville.
W. B. STALEY, Ch.

T. S. WEBB and H. H. TAYLOR for complainants.

LOGAN & LUCKEY and W. M. BAXTER for respondents.

DEADERICK, C. J., delivered the opinion of the court.

These two cases were consolidated and heard together and decrees rendered, from which the complainants in both bills, and defendants Exchange and Deposit Bank, John Baxten and Wm. M. Baxter, trustee, have appealed to this court. The defendants appeal only from the decree in favor of Swepson.

Swepson had obtained judgment in the circuit court of Knox county, at its October term, 1876, against the Exchange and Deposit Bank, for upwards of \$3,000. Upon appeal by defendant, the judgment was affirmed

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by this court, at its September term, 1878. Execution issued upon said judgment in November, 1878, and was levied upon a lot in Knoxville, adjoining the lot of Col. Terry and others, and known as the Fouché lot, and sold by the sheriff in January, 1879, to Swepson, and deed executed to him by the sheriff.

The proceeds of sale, some \$275, after deducting charges and certain proceeds of personalty sold, were credited on the execution, leaving a large part of said judgment unsatisfied, and there were no other assets of the bank for the satisfaction of said balance.

In the meantime, John Baxter, who had theretofore been president of said Exchange and Deposit Bank, resigned his position as president, and Lewis T. Baxter, in 1876, became president thereof.

John Baxter, being the sole stockholder in said bank, while he was president, advanced various sums to pay off depositors and other creditors of the bank, amounting, about the time he resigned its presidency, to the sum of near \$30,000.

In January, 1876, after Lewis T. Baxter became president of the Exchange Bank, it is alleged that he conveyed three lots in Sneed, King & Co.'s addition to Knoxville, to John Baxter, described as lots 257, 258 and 259, for the expressed consideration of \$3,266, cash in hand paid. This conveyance is alleged to have been null and void, and without consideration, as well as the conveyance of the Fouché lot. That these four lots were all the unencumbered property the bank had in January, 1876, and that it was then insolvent, and John Baxter, the sole stockholder, was by the

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terms of its charter individually liable for its debts, and that these conveyances were made to hinder and delay the creditors of said bank; that the property of the bank was primarily liable for its debts to depositors, before those due a stockholder.

Said Lewis T. Baxter, as president of said bank, in February, 1877, also conveyed to John Baxter, individually, the Fouche lot in Knoxville, in part payment of the advances made by John Baxter for the bank, besides certain debts due the bank, which are perhaps now, and were then, of little or no value.

On the 30th of January, 1878, defendant John Baxter made a deed of trust to secure his creditors, upon his own property, including therein the three lots conveyed to him by Lewis T., as president of the bank, and the Fouche lot.

This deed, which was registered soon after its execution, made his son, Wm. M. Baxter, trustee, and relieved him from the obligation to give security for the performance of the duties of trustee. It preferred certain creditors, with the provision for the payment of all his own debts and the debts of the Exchange and Deposit Bank. It is apparent, however, that the trust property will fall short of paying the preferred debts.

Swepson's bill is filed for the purpose of relieving the Fouche lot of the cloud upon his title, acquired by his purchase at sheriff's sale, in part extinguishment of his judgment, claiming that he had a lien upon it by virtue of his judgment, when the same was conveyed by Lewis T., president, etc., to John

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Baxter; and this lien it is alleged, and so it appears from the record, was perfected by the issuance of execution and levy upon and sale of the lot.

It is also alleged that the trust deed conveyed no title to the trustee, because at the time of the filing of his bill, there had been no legal registration of said deed.

The bill further impeaches said deed, upon the ground that the trustee is a young man, without means, is excused from giving bond, and is given unlimited power as to the time and manner of the sale of the trust property.

It is also objected that the date and amount of the debts preferred are not given.

The bill prays that the deed for the lot adjoining Col. A. Terry and others, and lots 257-8-9, be set aside, and the deed of trust to Wm. M. Baxter be declared null and void, and for a decree against John Baxter individually as the sole stockholder of said bank, for the unpaid balance of the judgment against the bank.

Defendants John Baxter and others demur to the bill, upon the ground that it is multifarious, in seeking to remove a cloud upon the title to the Fouche lot; to declare fraudulent other conveyances of other lands, and to hold John Baxter liable to the payment of the debt because of his liability as sole stockholder, for all the debts of the Exchange and Deposit Bank; the defendants, Wm. M. and Lewis T. Baxter having no interest in that part of the case which seeks to hold John Baxter liable as stockholder for the bank's

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debts, and because the bill should have been a general creditor's bill.

The demurrer was overruled and the defendants answered, denying fraud and insisting upon the validity of the several conveyances.

The bill of the First National Bank of N. Y., also a creditor of the Exchange and Deposit Bank, contains substantially the same allegations as those made by Swepson, and prays for the same relief, except that it appears to have been filed on behalf of all the creditors of said insolvent bank.

Similar demurrers were filed in this case to those filed in the Swepson case, and were overruled.

The court sustained Swepson's bill so far as to remove the cloud upon his title to the Fouche lot, but sustained the conveyance of John to Wm. M. Baxter, and appointed the latter receiver to take into his possession the assets of the bank for the benefit of its creditors, and held John Baxter liable for any balance due said creditors, upon the ground of his being the sole stockholder of said bank.

In the argument the defendants press the objection to Swepson's bill, that it is multifarious. No appeal, however, was taken from the decree in favor of the First National Bank of New York.

While the definition of multifarious, "the improperly joining in one bill distinct and independent matters, and thereby confounding them," is generally accepted and approved, yet it seems somewhat difficult to make application of it to cases as they arise. Perfectly distinct and unconnected matters against one

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defendant, makes a bill multifarious: Sto. Eq. Pl., sec. 271. But under our statute this rule has been modified. It has been enacted that "the uniting in one bill of several matters of equity, distinct and unconnected, against one defendant, *is not* multifariousness:" Code, sec. 4327.

But the demand of several matters of a distinct and independent nature against several defendants in the same bill, would make the bill multifarious: Sto. Eq. Pl., sec. 271.

Thus, if A. should file a bill against B. and C., seeking to enforce a vendor's lien against B. and to foreclose a mortgage on a different tract of land belonging to C., we can readily see that the matters are wholly distinct and independent of each other. On the other hand, if a debtor makes a fraudulent conveyance of different portions of his property to different grantees, and they to others, all may be joined in the same bill as defendants. So, a bill may seek to set aside fraudulent conveyance and subject other property, not conveyed, to the satisfaction of complainant's claim, and is not multifarious: See 1 (Milliken's) Meigs' Digest, p. 697-8. A bill against several parties, where all their rights are so connected that the court can adjudge them, is not multifarious: 7 Bax., 333.

When a bill has but one object, the court may grant such relief as is incident thereto, and a bill to remove clouds from title, recover possession, and have account for rents and profits, is not multifarious: 7 Bax., 616.

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The object of Swepson's bill is to have satisfaction of his judgment against the Exchange and Deposit Bank. He alleges that Lewis T. Baxter, the president of the bank, after he obtained his judgment, conveyed the land levied on by him, before it was sold under his execution, and that John Baxter conveyed it to W. M. Baxter, trustee, who holds and claims the same under said deed, and he seeks to have this incumbrance removed and his title quieted.

He also seeks by his bill to have John Baxter's individual property subjected to the payment of his judgment, and the three lots conveyed by Lewis T., as president of the bank, to John Baxter, and by him to Wm. M. Lewis T., as president of the bank, the debtor of complainant, is a proper party in order to the granting of this relief. He represents the bank. John Baxter, as the sole stockholder, is bound by the bank charter for all the bank debts. He stands in the attitude of a surety for an alleged insolvent corporation, and the bill prays that he may be compelled to pay the debts which the bank is bound to pay and for which he is also bound; and to attain this object the bill prays that the conveyance of the Fouche lot and the three lots, Nos. 257-8-9, from Lewis T., president, to John Baxter and from him to Wm. M. Baxter, may be set aside, and that the conveyance of other property by said John Baxter to said trustee, for reasons stated in the bills, may also be set aside and declared void, and subjected to the payment of his debt.

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It seems to us that these bills have but one object, the subjection of property and rights of the Exchange and Deposit Bank and of John Baxter, to the payment of their debts, and in pursuit of that object they may hold the defendants to account for property conveyed to them which should be so applied. It is conceded that John Baxter, as sole stockholder, is liable for the bank's debts, and it is charged that he has wrongfully conveyed his property to said trustee, and that belonging to the bank which its president had conveyed to him.

These three parties and the named beneficiaries in the trust deed, are made defendants to the bills, and we think properly. So there was no error in the action of the chancellor in overruling the defendants' demurrer. The objection that Swepson sues for his own use only, is answered in the fact that the two bills are consolidated, and Swepson's recovery will enure to the benefit of all the creditors, and it was so decreed by the chancellor, and the other bill is filed in behalf of all creditors.

The complainants attack the deed of trust of John Baxter as fraudulent in law, upon several grounds.

It is said the deed is fraudulent on its face, because no time is specified within which the property shall be sold, and the trust closed; and the trustee is authorized to rent, until a sale is made, which may be on credit or for cash; and to compromise or arbitrate any matter or litigation that may arise in the execution of the trust, and to do all other proper and necessary acts as fully as the grantor could do; and

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the deed does not show how much is due to any of the preferred creditors.

No specific time is fixed for the sale of the property, or within which the trust shall be closed. But this omission does not amount to a stipulation in the deed for such delay in the execution of the trusts as would make it fraudulent. And it is intended that the trust may be executed without delay, and in fact part of the property had been sold and proceeds applied as directed, at the time the bills were filed. The stipulation for a sale upon credit, if deemed best by the trustee, does not of itself avoid the deed. It was not unreasonable to allow such discretion, if the interest of the secured creditors could thereby be promoted. And although in several New York cases, referred to by complainants' solicitors, the authority to sell on credit is held to render the deed void, we are not prepared to adopt such conclusion, especially in a case where it is conceded that the property conveyed is inadequate to the satisfaction of the preferred debts; nor do we see any sound reason why a trustee may not be invested with the power to settle by compromise or arbitration, any matter or litigation arising in the execution of the trust; nor is it a fatal objection to the deed that it does not state the amounts of the debts of the preferred creditors. Their names are given, and the amounts due them are readily ascertainable, being notes or bills. In the case of *Young v. Gillespie*, 12 Heis., 239, the decision seems to have been placed upon the ground that the provision, "that all others we owe for borrowed money," shall be first

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paid, in which neither the names of creditors nor amounts of debts were given, was a "meditated subterfuge" to perpetrate a fraud. Upon the whole, we are of opinion that the trust deed is not void for any of the reasons insisted on by complainants.

It is also objected that the trust deed was not properly registered at the date of the filing of the bills, and that for this reason the complainants may subject the property therein mentioned to their debts. The deed was properly acknowledged and noted for registration, but it seems was recorded in the book for the registration of chattel mortgages, etc., and not in the book of trust deeds or conveyances of real estate. It was, after the bills were filed, registered in the proper book. Sec. 456*a* directs the register to keep a book for the registration of trust deeds, etc. This section is directory to the register, and when a deed is noted and registered, it is notice to "all the world," from the time it is noted: Code, sec. 2073.

The chancellor decreed that said deed was not fraudulent in law nor in fact, and that it vested the trustee with the title to the property therein described, except as to the Fouche lot, as to which it gave Swepson the relief he prayed for. He further declared that the complainants were entitled to have the Exchange and Deposit Bank wound up as an insolvent corporation, and to have decrees against John Baxter as sole stockholder, for the amounts due complainants and other creditors of said bank, subject to credits for any sums realized from the assets of said bank. And the chancellor also directed the trustee to execute said

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trust deed, and to pay over proceeds to the clerk and master, to the end that after deducting prior charges upon the fund, it might be applied towards the payment of the claims of the creditors of said bank, who were to be notified by publication to present their claims.

The decree will be modified as to the three lots, Nos. 257, 258 and 259, which were conveyed as the property of the bank, in 1877, to John Baxter by Lewis T. Baxter, president of the bank. The bank was insolvent at the time of this conveyance. And its assets at that time were a trust fund for the payment of all its creditors, and could not rightfully be perverted to the payment of a debt due its sole stockholder, who was also liable for its debts, and by him conveyed in trust for the payment of his individual indebtedness.

The deed, therefore, of said Lewis T. to John Baxter, and his trust deed to Wm. M. Baxter, are inoperative and void, so far as the attempted conveyance of the three lots is concerned, and these lots will be sold under the direction of the chancery court, and the fund arising therefrom will be applied to the satisfaction of claims of creditors of the said bank. In all other respects the chancellor's decree will be affirmed.

The costs of this court will be paid, one-half by complainants in the two bills, and the other half by John Baxter, and the cause will be remanded.

Charles v. Spears.

C. A. CHARLES, Adm'r, v. C. H. SPEARS, Adm'r, *et al.*

ESTOPPEL. *Former suit.* An adjudication, in a bill filed by an administrator to subject realty descended, that the personalty had been exhausted, is not an estoppel upon the heirs from contesting that question in a subsequent suit by a creditor for the same purpose, and showing a *devastavit*.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville.
H. C. SMITH, Ch.

KYLE & McDERMOTT for complainant.

W. P. GILLENWATERS for defendants.

DEADERICK, C. J., delivered the opinion of the court.

Complainant filed his bill in the chancery court of Hawkins county, to obtain satisfaction of a judgment he had obtained in this court against said C. H. Spears, Administrator of D. A. Spears, and in his own wrong.

The bill alleges that defendant C. H. Spears made a fraudulent conveyance of a tract of land, in said county, to one Thompson, to hinder and delay the collection of his judgment, and prays to have the conveyance set aside and the land so fraudulently conveyed, subjected to the payment of his debt.

The bill further alleges that defendant's intestate,

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D. A. Spears, was the owner of a tract of land in said county, and that his personal estate has been exhausted in the payment of debts, and prays to have said tract of land subjected to sale, etc. Thompson, the alleged fraudulent vendee, and the widow and heirs at law of said D. L. Spears, deceased, are made defendants.

The chancellor ordered an account to ascertain, amongst other things, whether the personal assets had been exhausted in payment of debts. The master reported all the assets which came to the hands of the administrator had been so exhausted, except about \$3; setting forth the debts paid, when due and when paid. The amount of assets received is stated at \$2,290.49.

Upon exception filed by the defendants, payments by the administrator aggregating more than the debt of complainant were disallowed, upon the ground that they were made more than two-and-a-half years after grant of administration, without request for delay by the creditors, and it was held that the administrator was guilty of a *devastavit* in making such payments, and there was, therefore, in his hands a fund sufficient to pay complainant's claim, and the lands descended to the heirs could not be subjected to the payment of said claim.

The chancellor, therefore, dismissed the bill, so far as it sought relief affecting the heirs at law of D. A. Spears, but he declared the sale of the land by C. H. Spears to Thompson to be fraudulent and void, and directed its sale by the master for the satisfaction of complainant's decree.

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No appeal was asked for or taken by any of the parties. But the complainant has filed the record here for writ of error, and asks a reversal of the decree so far as it refuses the relief sought against the land descended to the heirs of D. A. Spears, deceased. Upon the argument of the exceptions, it was in evidence that D. A. Spears died in February, 1860, and administration was granted on his estate March, 1860, and in 1866, upon a bill filed by his administrator to sell land to pay debts, to which the widow and heirs were defendants, upon an account ordered, the same debts were reported as paid, that were excepted to in this case. No exception was taken then to the payments of these debts, and the court ordered a sale of land to pay other debts. The debt in suit in this case was not one of those included in the report, it being then in suit.

Complainant insists that the report then and decree affirming it, are conclusive that the personalty was exhausted in payment of debts of the estate, and the chancellor erred in refusing to so declare.

But the complainant was no party to the cause in which said debts were reported, and defendants are not estopped in this suit to set up defenses, which were not made in the suit with other parties.

We are of opinion, therefore, that there was no error in the chancellor's decree dismissing the bill as to the widow and heirs at law of D. A. Spears, deceased, and the same will be affirmed.

Hume v. Bank.

WILLIAM G. HUME *et al.* v. COMMERCIAL BANK *et al.*

BANKS. *Directors.* Directors who do not accept and fail to discharge the duties of the office not liable to creditors.. The owners of the charter and stock of a State bank, men of good character and having the confidence of the community, published in the newspapers of the city in which the bank was located, a business card of the bank, with their own names as officers, and with the name of one of themselves as a director, and the names of four other persons as directors, who were not stockholders, who had never been notified that they were elected directors, nor accepted the office, nor acted as such, and continued the publication for over four years with the knowledge of such persons, but without their active participation. *Held*, the bank having failed, that the creditors had no right of action, either through or independent of the corporation, against such persons for failing to discharge the duties of directors, it not appearing that they, or either of them, had done or said anything tending to lead any of the creditors to believe that they were directors.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W.
B. STALEY, Ch.

CORNICK & CORNICK for complainant.

JAMES COMFORT for Trustee.

INGERSOLL & COCKE for Tillman, Administrator.

GEORGE ANDREWS and W. M. BAXTER for Ross
and Boynton.

GEORGE BROWN and GEORGE WHITE for Henegar.

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COOPER, J., delivered the opinion of the court.

By the act of 1870, ch. 96, Hugh L. McClung, R. M. McClung, John Williams and R. R. Swepson, were created a body politic and corporate under the name and style of the Commercial Bank of Knoxville, subject to all the restrictions and penalties, and entitled to all the benefits and privileges of the charter creating the Knoxville Bank, passed March 25, 1866. The Knoxville Bank charter provides that the capital stock shall not exceed \$100,000, and that the corporation shall be subject to such general laws as the Legislature may pass in reference to banks and other similar institutions. By the third section of the act of 1870, ch. 96, it is provided: "That the individual property of the several stockholders shall be responsible for all the debts, liabilities and deposits of said bank."

About the 20th of November, 1872, at the instance of R. M. McClung, and in a blank book furnished by him, entries were made by a lawyer to the effect that the charter granted by the act of 1870, was accepted by the corporators named, and that John Williams and R. R. Swepson had transferred their rights under it to R. M. McClung, R. R. Bearden and Sam House, and opening the books for subscription to the capital stock of the bank. Thereupon, R. M. McClung, Bearden and House each subscribed for the stock to the amount of either \$30,000 or \$31,666.66. At the same time the names of James R. Cocke, H. B. Hengar, D. T. Boynton, G. W. Ross, and, perhaps, Hugh

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L. McClung, or W. Easley, Jr., or both, were also signed to the stock list for shares to the amount of either \$1,000 or \$2,000 each. It is agreed by all the witnesses who testify that they were present on the occasion, that H. B. Henegar, who lived about seventy miles from Knoxville, was not there, and that his name was signed by R. M. McClung. The evidence tends also to show that neither Hugh L. McClung nor W. Easley, Jr., was present. They are not parties to this litigation. Whether the names of Cocke, Boynton and Ross were signed by themselves, or by other persons, is one of the contested questions of fact. The blank book containing the subscription list was kept in the vault of the bank, and was produced and submitted to the creditors at a meeting held by them after the failure of the bank as hereinafter mentioned. It is not traced further, and when search was subsequently made for it could not be found. Curiously enough, no creditor who then saw it, most of whom were probably citizens of Knoxville, is called upon to testify as to the hand-writing of the subscribers.

Immediately after the subscription of stock, the bank commenced business with R. M. McClung as president, R. R. Bearden as vice-president, and Sam House as cashier. An advertisement of the fact, giving the names of these persons as the officers, and stating the board of directors to be James R. Cocke, H. B. Henegar, D. T. Boynton, G. W. Ross and R. R. Bearden, was published in the daily and weekly editions of two Knoxville newspapers, and continued to be published in the same form until after April 4, 1877. On that

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day, the bank suspended business, and made to Hugh L. McClung, as trustee, a general assignment, for the benefit of creditors, "of all its property, real and personal and mixed, and all its assets and effects of every kind and description." McClung declined to accept the trust, and James Comfort was appointed trustee in his place.

R. M. McClung, Bearden and House understood themselves to be sole owners of the bank, and of the stock subscribed, and so say in their testimony. They had agreed among themselves in advance to share equally the profits and losses, and to pay interest to each other upon any money paid in by either on the capital stock. In fact, only \$8,141.05 were paid in by Bearden, and the amount was put on the books of the bank to his individual credit. No call of stock was ever made, nor stock account kept. No meeting of stockholders, except at the organization of the bank, and no meeting of directors at any time, was ever held. No notice of the subscription of stock to the persons not present when the names were signed, nor of the election of directors seems to have been given. As between them and the bank as a corporation, neither Cocke, Henegar, Boynton or Ross ever claimed to be, or was recognized by the officers or stockholders, as directors in the actual conduct of the business. The last three were depositors of the bank, Henegar closing his account January 1, 1876, Boynton January 1, 1877, and Ross continuing until the suspension. Cocke died in July, 1874, and Lewis Tillman qualified as administrator of his estate on the 8th of the succeeding month.

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He enquired at the bank and was informed by McClung that his intestate had no interest therein.

From the commencement of the business of the bank, McClung, Bearden and House seem to have treated the deposits and assets of the bank, as well as the franchises of the charter, as their individual property. Each of them drew from the bank whatever money he thought proper, making a memorandum or ticket of the amount, which was theoretically treated as on call and carried into the books of the bank as cash on hand. On September 26, 1874, a trial balance on this basis was taken, and showed an apparent profit of over \$11,000, and the partners drew out in all \$10,064.65. But if the items included in the cash account, which ought to have been charged to the individual accounts of the parties, had been properly posted, the true statement would have shown a loss of several thousand dollars. The capital paid in had been exhausted, and there was an actual deficit as early as January 1, 1874. On September 26, of that year House sold his stock and interest in the bank to McClung and Bearden, and severed his connection entirely by resigning his office of cashier. After that date, McClung and Bearden continued to draw out money for their own purposes, and to allow firms with which they were severally connected to become over-checkers, until at the time of the suspension there was a deficit, thus occasioned, of over \$80,000.

On July 3, 1877, the original bill in this cause was filed by W. G. Hume and others, as creditors of the Commercial Bank, as well for all other credi-

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tors as for themselves, against the Commercial Bank, and McClung and Bearden as officers of the corporation and individually, James Goodrich, cashier, and James Comfort, trustee, H. B. Henegar, D. T. Boynton, G. W. Ross and Lewis Tillman, administrator of James R. Cocke, deceased. The object of the bill is to hold the last four defendants liable for "all the debts, liabilities and deposits of the bank," under the provision of the third section of the charter; and to hold them liable for all sums of money misapplied or misappropriated by the officers of the bank, because they had "negligently omitted and wilfully neglected to discharge the duties incumbent upon them as directors."

On September 27, 1877, James Comfort, as trustee, answered the original bill, and filed his answer as a cross-bill against the other parties defendant to that bill, the parties complainant thereto, and all the creditors of the bank, for an adjustment of disputed debts, the settlement of his trust under the orders of the court, and to hold Henegar, Boynton, Ross and Tillman, administrator, liable as stockholders and directors. This bill sets out the dealings of McClung and Bearden with the funds of the bank, and their misappropriation of those funds to their own use, and avers that the facts appear on the books, and that an examination at any time would have shown the truth. The bill further alleges that Henegar, Boynton, Ross and James R. Cocke were, during all the time, published to the world as directors of the bank with their knowledge, and by their consent; and that the

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knowledge on the part of the public that they sustained this important relation to the bank gave it credit, and induced the depositors, who are now the creditors, to deposit their funds in the belief that the supervision of these directors rendered it a safe and reliable institution; but that they wholly failed to discharge any of their duties as directors, and omitted and neglected to exercise any supervision or control over the bank officers, and by this gross and wilfull negligence permitted such unlawful appropriation of funds.

All of the defendants, who are thus sought to be charged, deny in their answers that they were either stockholders or directors of the bank, or had anything to do with it, as a matter of fact, in either capacity. The evidence is entirely conclusive that not one of them ever claimed to be, or received any benefit as a stockholder, or ever, in any way, whatever, acted as a director. The bank was, as we have seen, exclusively claimed, owned and managed by McClung, Bearden and House. These persons all say in effect what Bearden says in so many words, that it was understood that all the stock, no matter by whom subscribed, was owned by them. They were, in reality, stockholders, officers and directors. Under these circumstances the presumption, where there was a conflict of testimony on the point, would be that they had made the subscription themselves.

Before stating the testimony on this subject, it may be well to premise that McClung, from 1865 to the organization of the Commercial Bank, had been the

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cashier of the First National Bank of Knoxville, which had gone into liquidation. He was anxious to start a new National bank, and for this purpose had consulted the parties sought to be charged in this case, and especially Boynton and Ross, one of whom was the pension agent and the other a disbursing officer of the United States at Knoxville. These parties had agreed to take stock in such a bank to be managed by him. It was found, however, that the limit of currency then allowed by act of congress had been reached, and a National bank could not be organized. McClung, therefore, determined, in conjunction with Bearden and House, to start a bank under a State charter, but with the intention, if, as he thought probable, congress should at its approaching session increase the currency, to turn it into a National bank. In the event of such a change, it was understood that the defendants would become stockholders.

In this attitude of the parties, the Commercial Bank was organized. The lawyer who drafted the entries in the subscription book says that it was understood that McClung, Bearden and House were to own the bank, but he was not present when it was organized. McClung says that he, Bearden and House, and perhaps Cocke, were present. He, Bearden and House each subscribed to the capital stock \$31,666.66. He then subscribed the names of Hugh L. McClung, Henegar and Ross for \$1,000 each. He thinks Bearden subscribed the names of Boynton and Cocke for a like amount. He cannot say that he had permission or authority from Henegar or Ross to make the subscrip-

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tion, and does not know that he ever had any conversation with either of them about their being stockholders or directors. Bearden, in his examination in chief, says that McClung, House and himself were present, and he thinks the lawyer who drafted the entries. He says that the whole stock of \$100,000 was subscribed by McClung, House and himself, McClung entering \$1,000 each to Ross, Boynton and Henegar. "It was, however," he adds, "understood that all the stock was owned by McClung, House and myself." On cross-examination, he says that he is not positive whether Cocke subscribed in person, or whether the subscription was made by some one for him. His recollection is that Cocke knew of the subscription. "But," he repeats, "all the stock I regarded as belonging to McClung, House and myself." He says he had no authority to sign for any one except himself, and does not remember that he did. He is asked by complainant's counsel: "Did not Boynton, Ross, Cocke and Henegar know that stock had been subscribed in their names, and agree that it might remain in their names, and were they not fully advised that they were to be advertised as directors before the advertisement appeared?" His answer is: "Not to my knowledge, unless as to Mr. Cocke, which has been explained. I never had any conversation with Ross, Henegar or Boynton on the subject until the bank suspended. I never consulted with either of the parties in regard to the use of their names as stockholders or directors, nor in regard to publishing their names as such." This witness also says that McClung told him

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that Boynton, Henegar and Ross expected that the bank would be turned into a National bank, and if this was done on the basis of \$50,000 capital they would each take \$5,000 in stock, and would prefer McClung for president. The bank was organized under a State charter, but the purpose was to make it a National bank. Finding that it required a capital of \$100,000 to make it a National bank, it was continued under the State charter.

House testifies first that McClung, Bearden, Cocke, he and others organized the bank. Further on, in answer to another interrogatory, he says that McClung, Bearden, Cocke, Webb (the lawyer who drafted the entries), and he were present at the organization, and, he adds, "I think D. T. Boynton and George W. Ross." He says that McClung, Bearden and he each subscribed \$30,000 to the capital stock, and Ross, Boynton, Henegar and Cocke each \$2,000. As to the other \$2,000 necessary to make up the \$100,000, he is not positive whether it was in the name of Hugh L. McClung or W. Easley, Jr., or both, but thinks both names were on the book. He elsewhere states that Henegar's name was signed by McClung, that Cocke signed for himself, and he or Bearden subscribed for Easley, if he was a stockholder. He does not recollect that Hugh L. McClung was present. Thinks Boynton and Ross subscribed themselves, but may be mistaken as to their being present. He explains that he was still in the employ of the First National Bank as book-keeper, that he was called in when they were ready to organize, that he was sent by McClung to Boyn-

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ton and Ross and had the conversations with them testified to, and got away as soon as possible as he had no time to spare. He was, it seems, sent by McClung to explain to Boynton and Ross the plan agreed upon for organizing the bank, namely, that Bearden should be president, McClung vice-president, and he, House, cashier. Boynton and Ross objected to the making Bearden president, preferring McClung. The plan was changed accordingly, and upon his returning and notifying Boynton and Ross, they expressed themselves satisfied. He is asked: "Did you ever see the names of Boynton and Ross on the stock book? If so, in whose handwriting were they?" His reply is: "I recollect seeing a list of stock on the books used at the organization, but do not recollect the handwriting."

Hugh L. McClung says he does not think he was present when the bank was organized.

Boynton, Ross and Henegar all testify that they were not present at the organization of the Commercial Bank; never subscribed, or authorized any person to subscribe stock therein, and were never informed of the subscription or that any person claimed that they were stockholders until the suspension of the bank. Boynton and Ross both speak of having joined McClung in an application for a charter of a National bank which failed. And Ross adds that McClung told him that he, Bearden and House were going into a new bank under a State charter until congress met, when he thought the volume of currency would be increased, and if it was he would renew his application.

In this state of the evidence it is clear, and is

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frankly conceded by the trustee, that there is no sufficient proof that Henegar either authorized the subscription of stock made in his name by McClung, or afterwards ratified it. He cannot, therefore, be held liable as an actual stockholder.

McClung admits that he signed the names of Hugh L. McClung, Henegar and Ross to the stock list, and says that Bearden signed the names of Boynton and Cocke. Bearden first testifies that the whole stock was subscribed by McClung, House and himself, McClung entering \$1,000 each for Ross, Boynton and Henegar. He is not positive whether Cocke subscribed in person, or whether the subscription was made by some one for him. His recollection is that Cocke knew of the subscription in his name. House testifies that Cocke was present at the organization, and thinks that Boynton and Ross were also, although, he concedes, he may be mistaken in this.

The evidence illustrates the uncertainty of human memory in the matter of details, important and unimportant, after the lapse of years. Bearden and House both think that the lawyer, who drafted the preliminary entries in the blank book, was present at the organization of the bank, while McClung and the lawyer himself testify that he was not. House, although conceding that he may be mistaken, thinks that Boynton and Ross were present on that occasion, while McClung and Bearden concur in testifying to the contrary. McClung swears that Bearden signed the names of Boynton and Cocke, while Bearden swears that McClung entered the subscription to the name of Boynton.

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ton as well as of Henegar and Ross, and House thinks that Bearden or Cocke signed the name of Easley, if, he adds, Easley was a stockholder. McClung and Bearden limit the subscription of the outside parties to \$1,000, while House raises it to \$2,000. House says Cocke signed in person, while Bearden is in doubt whether the subscription was not made by some one else, and McClung is positive that Cocke's name was signed by Bearden. No explanation is offered by either of these witnesses who think the subscription was made in person, of the curious fact, if fact it be, that parties should so subscribe for the exclusive benefit of others, all three witnesses agreeing that they were to be sole owners of stock and bank.

Only one witness, outside of the officers and the parties, is examined whose testimony bears on this branch of the case, and he only says that in the financial panic of 1873, Ross assured him that there was no danger, and that the bank would resume in a few days; and that on one occasion, probably before that event, Cocke, while speaking highly of the bank, and naming the directors, said, according to the witness' best recollection, that he was a stockholder; but the witness adds: "I do not state it positively."

Under these circumstances, the oaths of Boynton and Ross are sufficient to turn the hesitating scales so far as they are concerned, and the result thus produced may equally weigh in favor of Cocke, who cannot be a witness in his own behalf. The version of the transaction given by McClung is consistent with this view, and most in accord with the conduct of all par-

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ties. It is almost certain that McClung, feeling assured that these friends of his would join in the establishment of a National bank, and intending to turn his State bank into that character of institution, persuaded himself and his colleagues that they might use their names as they did. And, at any rate, the complainants have failed to make out by satisfactory proof such a case as is required where parties are to be charged personally as stockholders with the liabilities of an insolvent corporation, with which it is clear they had in fact nothing whatever to do. We are of opinion that Boynton, Ross and Cocke were not stockholders of the Commercial Bank.

It is argued, however, that although not actually stockholders, all of these parties may be held liable as such upon the principle that being directors and having access to the books, they are chargeable with knowledge of, and concluded by what appeared on the stock book. For this principle counsel cite *Moses v. Ocoee Bank*, 1 Lea, 398, 407, and *United Society of Shakers v. Underwood*, 9 Bush, 617. But both of these cases were cases in which the persons sought to be charged were stockholders in fact, and actual directors. In the case before us, the persons sought to be charged were never stockholders, and only nominal directors. They had never undertaken to perform the duties of the board of directors, were never in control of the business of the bank, nor allowed access to its books. A director in law and fact, who actually assumes the duties of an office, must be held to its responsibilities, and will be bound by the necessary presumptions raised by the

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facts. The same strict rules are clearly not applicable to nominal directors, who have never accepted the office although held out as such. Nor are the defendants estopped to deny that they were stockholders by the fact of having become directors, or held themselves out as such. For it is not necessary that a director should be a stockholder unless expressly required by the charter or by statute: *In re British etc., Association*, 5 Ch. Div., 306; *State v. McDaniel*, 22 Ohio St., 354. No such requirement is contained in the charter of the bank under consideration. That instrument does provide that the corporation shall be subject to such general laws as the Legislature may pass in reference to banks and other similar institutions. And the general banking law directs that not more than two-thirds of any bank directory shall be stockholders in the bank for which they act as directors: Act of 1860, ch. 27, sec. 15; Rev. Code, sec. 1829b, sub-sec 15.

The principal defendants were unquestionably held out to the public as directors of the Commercial Bank by advertisement in the public newspapers at Knoxville, continuously published from the organization of the bank until its suspension. It is certain also that these defendants saw the advertisement, and took no steps whatever to have it withdrawn. No doubt, too, the belief that they were directors had a tendency to strengthen the public confidence in the bank which already existed by reason of the business character of the officers of the bank. On the other hand, as we have seen, no formal notice was ever given to them

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of their election, nor any acceptance by them of the office, nor any assumption of its duties, nor any request by the owners and stockholders for them to perform the duties. They were never guilty of any misfeasance in office, but simply of neglect to perform. The bills of the creditors and the trustees both seek to hold them liable for negligence only.

We may premise the consideration of the question thus raised by saying that as James R. Cocke was not a stockholder, his liability as a director necessarily terminated at his death, and only those creditors whose claims originated in his lifetime would have any right of action: *Ogden v. Rollo*, 13 Abb. Pr., 300. The administrator would not be liable for neglect of the duties of an office which he neither assumed, nor was held out as assuming. If, moreover, the liability created in the lifetime of the intestate was to the corporation, and the creditors could only work out their equity by subrogation, the estate would be protected by the statute of limitations of two years and six months. And the same statute would bar all demands of citizens of this State in any event.

By the provisions of the Code in relation to private corporations, intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their liabilities, subjects all officers, stockholders or directors knowingly participating therein to the penalties of a misdemeanor, and, moreover, to damages at the suit of any person injured: Code, sec. 1488. And by the general banking law it is provided: "If any

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director or directors of any of the banks of this State shall be guilty of any fraud or wilfull mismanagement of the affairs of such bank by which any loss shall be occasioned to creditors, such director or directors, upon legal ascertainment of the fact, shall be individually liable for such loss": Act of 1860, ch. 27, sec. 26; Rev. Code, sec 1829*b*, sub-sec. 24. The cases provided for by these sections are cases of intentional fraud and wilfull mismanagement. The facts disclosed by the record before us do not implicate the principal defendants, even if they be treated as actual directors, in any such positive misfeasance. All [that they can, in any event, be charged with is neglect to perform the duties of directors. The liability, if any, for negligence, is not statutory, but depends upon the general principles of law regulating the relation of the parties.

The directors of a corporation are its principal agents, and occupy a fiduciary relation towards the corporation and the stockholders: *Shea v. Mabry*, 1 Lea, 319, 342; *Lane v. Bank of West Tennessee*, 9 Heis., 419; *Vance v. Phoenix Ins. Co.*, 4 Lea, 385; *Parker v. McKenna*, L. R., 10 Ch., 96; *Jackson v. Ludeling*, 21 Wall., 616. As agents they are primarily liable to the corporation both for non-feasance and mis-feasance, but they may, in equity, be proceeded against by stockholders or creditors in proper cases, who will be subrogated to the rights of the corporation: *Shea v. Knoxville & Ky. R. R. Co.*, 6 Baxt., 277; *Moses v. Ocoee Bank*, 1 Lea, 398; Ang. & A. on Corp., sec. 312. And such liability of directors is assets in the hands of the bank, and passes to a gen-

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eral assignee for the benefit of creditors: Morse on Bank, 135. These principles are plain enough, and easy of application in the case of real directors who have accepted and assumed the duties of office. The difficulty of applying them in the present instance grows out of the peculiar facts shown, presenting an altogether novel case, which has, perhaps, never passed into judgment.

In the first place, it is difficult to see how the corporation or the stockholders could maintain an action against the defendants on the facts of this case. The charter and the stock of the bank were exclusively owned by the persons whose duty it was to pay in the capital stock, and who misappropriated the funds. These owners and stockholders never called upon the defendants, or permitted them to discharge the duties of a board of directors. Clearly, neither they nor the corporation for them would have any right of recovery against the nominal directors. And the creditor, if he take anything by subrogation, must do so on his own merits or equities. And to enable the creditors to sue the defendants directly they must have some independent right of action either legal or equitable. Such an independent right is, as we have seen, created by statute where the director has been guilty of intentional fraud or wilfull mismanagement. And we are not prepared to say that it would not exist without the aid of the statute in such cases, for they would thus become participators in a wrong and liable to the person aggrieved: *Salmon v. Richardson*, 30 Conn., 260. But the testimony entirely exonerates the pres-

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ent defendants from all participation in, and knowledge or even suspicion of the acts complained of. They were themselves depositors in the bank, with the same unbounded confidence in the institution and its officers as the creditor complainants. The proof shows that the officers of the bank, especially the president, had the confidence of the entire community. The defendants, so far as appears, were never called upon by any existing creditor for information touching the bank or its officers. They are as free from blame as one of the creditors except in allowing their names to continue to be published as directors, when they were not directors. The litigation is, consequently, narrowed down to the point whether the acquiescence of the defendants in the publication of their names as directors confers upon the creditors of the bank a right of action against the defendants, either to be worked out through the corporation or independent of that of the corporation, for failing to discharge the duties of an office which was never actually accepted or assumed.

This point seems to be one of first impression, for the able counsel of the complainants have found no authority directly sustaining their contention. They rely in argument upon the analogy of the liability of a third person who holds himself out as the member of a partnership, and upon the general doctrine of estoppel. And inasmuch as the liability of a person who holds himself out as a partner rests upon the doctrine of estoppel, we may consider the whole argument under the head of estoppel.

The case of a nominal partner is not, however,

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strictly analogous to that of a nominal director. A partner is directly liable to every creditor of the firm, and the liability of a nominal partner is equally direct to those creditors of the firm to whom he makes himself liable. A director of a corporation, as we have seen, is the agent of the corporation, and ordinarily only liable directly to the corporation. If he becomes liable directly to a creditor, it must be by statute, or by some conduct which creates a privity of contract between them, or which results in a tortious injury to the creditor for which an action *ex delicto* will lie. And even in the case of a person who holds himself out to the world as a partner, the extent of liability seems to depend upon the mode of holding forth. If it be by his authority, assent or connivance, the presumption is absolute that he has so held himself out to every creditor or customer. If the holding out be by negligence merely, the liability would only be to such creditors as have been actually misled: *Pars. on Part.*, 119. And even a partner would not be liable directly to a creditor of the firm for a loss of partnership assets occasioned by mere negligence in the conduct of the firm business, nor, *a fortiori*, would a nominal partner who simply neglects to attend to the business at all. An agent is alone responsible to his principal for a neglect of duty: *Calvin v. Holbrook*, 2 New York, 126.

The law of estoppel is a branch of the law of evidence, for it is the law by which evidence of the truth is excluded. Equity does not favor estoppels against the truth, and it has been broadly said, per-

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haps too broadly, that where the element of fraud is wanting there is no estoppel. It is a growing branch of the law, in which decided cases are of less value than usual, for the reason that every cause must depend upon its own peculiar facts and circumstances. As a general rule there must be word or conduct by one party, action based thereon by the other party, and injury to the latter to preclude the admission of evidence in conflict with the word or conduct.

It is not pretended that the record shows that the defendants have ever said anything in regard to the bank, or their relation to it as directors, upon which the creditors have acted. The evidence does not show that any one of them authorized the publication of his name as a director, or so acted by word or deed as to induce any creditor to act on the assumption that he was a director. The names of the defendants were merely published to the world in the newspapers as directors by the owners and officers of the bank, and the defendants took no notice of the publication. It has been held at *nisi prius* in England, by Wilde, C. J., that persons could not be held liable, upon contracts made in their absence, as members of the acting committee of a railroad company, when they had not applied for the appointment, nor acquiesced in it, although they were advertised as such to the public. And the Chief Justice said: "No one is bound to contradict an advertisement:" *Griffin v. Beverly*, 2 C. & K., 644. It has been held in this country, that the publication of the name of a person as a trustee of a corporation and the issuance to him of a certifi-

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cate of stock, are not sufficient to make him liable for a fraud perpetrated by other trustees and agents of the corporation. The plaintiff swore that he had loaned money to the corporation upon the faith of certain statements made to him by an agent of the corporation, and upon his faith in the names mentioned as directors. "But," said Church, C. J., "he made the loan to the company and not to the directors. He had no right to rely upon their pecuniary responsibility from the fact of being directors. No such responsibility attaches to the office. It is only when a director lends his name and influence to promote a fraud upon the community, or is guilty of some violation of law or other mismanagement, that he is personally liable. When this is shown, he should be held to a strict rule of accountability:" *Arthur v. Griswold*, 55 N. Y., 400. Something more than the mere advertisement of their names to the public as directors seems to be required to create liability where the parties are not in fact directors.

Neither the publication in the first instance nor its continuance in the newspapers, in the case before us, was by the authority or express assent of the defendants. It seems to have been acquiesced in by mere negligence. If it be conceded that the publication may have had the effect to increase the public confidence in the bank, it would not follow that any of the existing creditors were thereby induced to trust the bank. One of the few creditors who testifies that his knowledge and information of the "high financial reputation" of the published directors induced him to

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place confidence in the "integrity and financial ability of the bank," concedes that he had a high opinion of some of the officers, and that one of them induced him to loan the bank his money on time by the offer of eight per cent. interest. The deposit of this witness was made on February 23, 1877, nearly three years after the death of James R. Cocke, one of the directors upon whose "solvency, fidelity and business ability" he relied. Other creditors put their confidence upon the ground that they at all times believed the defendants to be "*bona fide* stockholders." It is obvious that the publication was only one of many causes of the public confidence.

If in reality the defendants had been elected directors, and upon notice had accepted the office, the publication of the fact to the world with their tacit acquiescence would have been sufficient to charge them with the duties and responsibilities of the office, without reference to the extent of influence which the publication may have had on the creditor seeking to hold them liable. So, if they had acted as directors, whether properly elected or not. But something more seems to be required when the persons sought to be charged were not directors, when through the entire time of publication no word or act on the part of any one of them is proved tending to show that they held themselves out as directors, and when during nearly three years of that period one of the published directors was dead. Another of these directors was a "well to do farmer," living seventy miles from the bank, and only visited Knoxville two or three times

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a year. And still another was himself one of the officers of the bank. Obviously, the publication alone constituted but a single element in the confidence of the existing creditors, not one of whom ever consulted a supposed director upon the subject of the bank or his relation to it. The defendants had the same confidence in the bank as the creditors, and no more connection with its business. And it might be said, with some plausibility, that the deposit of the money of the creditors in the bank induced the defendants to acquiesce in the publication of their names as directors, as well as that the publication induced the deposits.

Under these circumstances, it would be too heavy a penalty to visit upon the defendants the result of the misplaced confidence of the public, merely because they negligently allowed the owners of the bank to publish their names as directors, without any overt act or word on their part which could have misled any person to his injury, and without the slightest testimony to connect them with the business of the bank, or the conduct of its officers and owners. If they had confederated with those owners to create a fraudulent corporation, the use of their names as directors, by their consent, to give it credit with the public, would have presented a different question. And so it would have been if any of them had actively misled any of the complainants to his injury. Upon the case made by the record, they are not personally liable to any of the complainants.

This conclusion renders it unnecessary to consider

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the extent of a director's liability for mere negligence in the performance of the duties of his office.

The chancellor's decree will be modified in accordance with this opinion, and the bills dismissed so far as they seek to hold the principal defendants liable as stockholders or directors. But these defendants will pay all the costs of the entire litigation between them and complainants in both bills.

FREEMAN, J., delivered the following dissenting opinion:

I concur in the majority opinion, so far as it holds that the defendants in this case cannot be held as stockholders. I do not think the proof sustains the contention of complainants on this question.

But on the point of their being directors, as to all parties dealing with the bank, and responsible, to the full extent that such a relation to the bank involves, I am unable to agree with the conclusion reached.

I am of the opinion that they have effectually estopped themselves, by their conduct, from saying they are not directors, so far as all persons dealing with the bank are concerned.

The advertisement in the Knoxville papers, when the nature and purpose of such advertisement is considered, seems to me conclusive on this question. It was not a mere newspaper paragraph, the work of the editor, giving his information on the subject; but it is more, it is an official notice by the bank of its organization, and its official managers. It notified the

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community that a new bank had been started in the city of Knoxville, and the parties named had undertaken to perform the duties appertaining to the positions they were announced as holding. It was an advertisement, as we have said, and not a mere newspaper notice, and therefore was intended to call the attention of the community to the fact stated in it. It was not notice of a private organization for private ends alone, but of a business institution, which by the nature of that business, would depend upon the public confidence for the success of the venture. It was a bank, which was expected to receive the money of all who might trust it—on deposit—and use it in their own business, and be ready to return it when called on. It is a business eminently based on confidence for its success—in fact, impossible to be conducted successfully without this confidence on the part of the public. The main elements of this confidence, as I understand it, are first the capital stock, and second, the skill and integrity with which that capital shall be used by the parties who shall have the direction and control of that capital, as well as the entire conduct of the bank. The directory, the parties who are to manage the institution, is of more importance to the success and safety of the bank, and the security of all parties concerned and dealing with the bank, than even the amount of the capital stock, as mismanagement, and bad use of this, by men not qualified for, or unfaithful to the trust, will soon dissipate the capital stock of any ordinary institution, as experience has abundantly shown.

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This being so, it seems to me, that when parties silently sit by, and permit the community to be notified for years, that they have assumed the management and direction of the affairs of a bank, and that until the bank has been rendered totally insolvent, that they shall not then be permitted, either to deny the fact to be as stated, or escape by any technicality from the responsibility justly attaching to the position so announced to the world as held by them.

How do they escape this responsibility in this case? As I understand it, by a simple disclaimer and denial, when the bank is found to be insolvent, and there is danger imminent in the positions which have been announced for them by the bank. Ought not years of fairly implied assent to the opposite, inviting the public to trust the bank on the faith of their names, as directors, to be of greater force than such disclaimer, made under such circumstances? I am compelled to think, it was then too late to escape responsibility by such a disclaimer.

I cannot see but that these parties must be held as having assented to the advertisement, as emphatically as if they had authorized the advertisement originally to have been made.

It is a fact, and must be held that the use of the names of these parties by the bank, was intended as a means of obtaining public confidence, else why publicly announce through the newspapers the fact at all. If untrue, and unauthorized, such unauthorized use of the names of these parties, was a fraud on them, by the parties so using them.

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But are they not parties to this fraud on the public—unintentionally it may be—but still certainly parties by all the rules by which we judge human conduct, and equally responsible to all who, in pursuance of the invitation given by the advertisement, give their confidence to the bank? They allow the bank to notify the public that we will manage the funds entrusted to this institution. You can, therefore, trust the bank—if you have confidence in us—for such a business. Having permitted the bank to use their names as long as the bank could use them successfully, but as soon as responsibility comes—the bank breaks, and danger threatens—it is promptly replied, that advertisement was only a snare and a sham—the bank has caught you by it—but you ought not to have believed the advertisement—it was false from the first—we knew it, but it was not our business to correct it—it was yours to find out how the facts were.

But does this accord with either sound law, or a sound morality. If a man allows, or knows of his name being advertised to the world as a partner in a trading firm, he is held responsible for all its debts, though in fact he never had the slightest interest in the concern. If he knows of such announcement, he is bound to disclaim, and announce the fact that a fraud is being perpetrated on him. If he fail to do this, he is held responsible, because it is a fraud on parties dealing with the firm, if he fails so to disclaim. Why should not the same rule apply to bank directors, as well as partners? I am unable to see any reason for such discrimination.

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There is no technical acceptance of the position of directors, but so far as the public are concerned, they have assumed the position, and have allowed the bank to so notify the community, and that for years. They are bound by acquiescence for this length of time—or else men may allow the use of their names to mislead others, and then escape responsibility by simply announcing the fact, that the fraud was a fraud, and the use of the name for this purpose unauthorized. It seems to me this opens the door wide to as much fraud as parties choose to perpetrate in this way—and then to sanctify it by legal approval.

Suppose these parties had permitted a similar advertisement as this, showing they were stockholders—a list of the stockholders—would any man say, in view of the numerous cases on this question, that these parties would be allowed to escape responsibility as such, by a simple disclaimer. I take it not.

For these reasons, and others that might be given, I am compelled to dissent from the opinion of the majority in this case.

DEADERICK, C. J., concurs in dissent.

Tribute of Respect to the Memory of R. L. Caruthers.

A TRIBUTE

TO THE MEMORY OF

Hon. R. L. CARUTHERS,

FORMERLY

ONE OF THE SUPREME JUDGES OF TENNESSEE.

KNOXVILLE, OCTOBER 23, 1882.

Hon. H. H. Ingersoll appeared before the Court on this, 23rd of October, 1882, and presented the proceedings of the Bar of East Tennessee, attending the Supreme Court, in honor of the memory of the late ROBERT L. CARUTHERS, formerly a member of this Court, and moved the Honorable Court to place them on its record as a perpetual memorial of the high esteem in which their deceased friend was held, and fully concurring with the Bar in its high appreciation of the merits of the deceased, the Court doth order that the proceedings be spread of record, which are as follows:

At a meeting of the East Tennessee Bar in the Superior Court room at Knoxville, on Saturday, the 20th of October, 1882, on motion of Hon. H. H. Ingersoll,

Tribute of Respect to the Memory of R. L. Caruthers.

Hon. W. P. Washburn was called to preside and Thomas Maloney, Esq., was appointed secretary.

The Chair having explained the object of the meeting, on motion of Hon. John Crozier, a committee of five were appointed to present an appropriate tribute in memory of the high esteem in which the deceased was held by the Bar of East Tennessee. The Chair appointed on the committee the following: Hon. John H. Crozier, Hon. R. M. Barton, Hon. J. B. Cook, Hon. H. H. Ingersoll and Hon. W. V. Deaderick, who retired and drafted and reported through the Hon. John H. Crozier, the following:

Tribute of Respect to the memory of Hon. ROBERT L. CARUTHERS by the members of Bar attending the September Session of the Supreme Court, 1882, at Knoxville.

From manhood, in whatever sphere he moved, whether as a member of society, of a Christian church, of the Bar or the Bench, or in political position, the influence of the long life of the Hon. Robert L. Caruthers were tranquilizing, peaceful and benign. Possessing naturally an amiable disposition his serene and pure life gave him at all times an equable, agreeable and cheerful temperament. When occasion, however, called for the exercise of the more commanding qualities of the man, such as firmness and decision of character, he exemplified that he was the possessor of these also.

After having filled the office of Attorney General of his circuit, soon after he entered on his professional career, and having become a ripe and mature lawyer

 Tribute of Respect to the Memory of R. L. Caruthers.

in every part of the profession, Judge Caruthers, in 1835, was elected to the Legislature of Tennessee. A convention, the year previous, having revised and amended the Constitution of the State in many important particulars, the succeeding session of the Legislature of 1835-6 was protracted and the labor of its members difficult and arduous. As a member of the Judiciary Committee of the House of Representatives, Judge Caruthers shared more than a common labor of the members of that body. To adapt the laws to the many important principles newly engrafted on the Constitution great changes were made. And at the termination of their labors as members of the Legislature, Judge Caruthers, jointly with the Hon. A. O. P. Nicholson, who was afterwards Chief Justice of this Court, entered upon the work of compiling the statutes of the State. This was accomplished so methodically and satisfactorily that the compilation remained a book of reference for Justices of the Peace, Lawyers and Judges for upwards of twenty years, and until our present code of laws was adopted. In 1841, Judge Caruthers was elected a member of Congress to succeed the Hon. John Bell. He was afterwards, in 1863, during the war of the States, elected Governor; but, as the whole State was in possession of the armies of the two belligerents, he never took the oath, or exercised the duties of the office. Politics seems not to have been an attractive occupation for Judge Caruthers, as he served but one term in the Legisla-

Tribute of Respect to the Memory of R. L. Caruthers.

ture, and but one in Congress, and was never again a candidate for these or other political positions. The exercise of his profession of the law was to him a work of love, and occupied the greater portion of his long and laborious life. He remarked to a relative and friend, that the happiest moments of his life were those employed in legal practice when he had a large bundle of papers on his table, making up a chancery record to read and investigate and ascertain what were the principles that governed and controlled it. After the resignation of the Hon. Nathan Green as one of the judges of the Supreme Court in 1852, Judge Caruthers was appointed by the Governor as his successor. At the next election he was elected to the same position by the people and served out his term of office as the associate of Judges McKinney, Totten, Harris and Wright. In this as well as every other public position that Judge Caruthers occupied, he showed that his talents and abilities were equal to any duty and labor that demanded close application, extensive knowledge and deep research. While occupied in his professional and judicial duties he was a most warm, earnest and liberal patron of the Law School at Lebanon, the place of his residence. He voluntarily discharged the duties of teacher in the absence or during the sickness of a professor, and in the after part of his life became senior professor of the law department of this institution. We think it probable this was the greatest source of pleasure and pride to him of all the

 Tribute of Respect to the Memory of R. L. Caruthers.

labors of his long life. By his personal labors and liberal patronage he furnished many young men of his own and other States with a finished education in the profession he had so greatly honored and highly adorned.

Possessing a noble nature and suave, gentle and accomplished manners, beginning with the first year of the present century, Judge Caruthers led a most serene and useful life, until he attained the great age of eighty-two years, without a ruffle to disturb its current, or an enemy to interrupt its happiness and enjoyment. He is the last of the distinguished men of the State to fall that began life with the present century.

Ripe in age, rich in knowledge, unblemished in character, he has departed this life respected, honored and revered by all.

Resolved, That as members of the same profession as the late Hon. Robert L. Caruthers, we take pleasure and pride in giving our attestation to his worth as a man, his distinction as a lawyer, his integrity as a judge and his usefulness as a citizen during his long and unblemished life, and that as a further and distinguished mark of respect to his memory and many virtues we respectfully petition the Supreme Court to have these proceedings entered on the minutes thereof in memoriam. Respectfully submitted.

JOHN H. CROZIER,
 R. M. BARTON,
 J. B. COOKE,
 W. V. DEADERICK,
 H. H. INGERSOLL,

Tribute of Respect to the Memory of R. L. Caruthers.

On motion of Hon. H. H. Ingersoll the resolutions were unanimously adopted.

Hon. Robert M. Barton moved that Hon. H. H. Ingersoll present the resolutions to the Supreme Court and move the Court to have them spread on its minutes, which was adopted.

The meeting then adjourned.

W. P. WASHBURN, *Chairman.*

THOMAS MALONEY, *Secretary.*

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1. *Judgment against. Right of heirs to contest. Technical defenses.*
Heirs have the right to make all defenses to a judgment against the administrator when it is sought to subject the land descended to them, but this right does not extend to mere technical objections or irregularities, not going to the question of the liability of ancestor for the debt, sufficiency of assets, or other meritorious defenses. *Buntyn v. Holmes*, 319.
2. *Heirs. Estoppel.* If the heirs are the administrators and make an agreement to have the land sold if claimant will allow the issue of fully administered to be found in their favor, they will be estopped as heirs from denying that the lands are liable for the judgment, and from insisting there were sufficient personal effects. *Id.*
3. *Alienation by heir.* Where land was mortgaged by heirs and afterwards levied on by their execution creditors and sold, the land may be sold by decree of court to satisfy a judgment against ancestor. An heir has no right to mortgage ancestor's land before payment of the debts, and the sale under execution was invalid, as the legal title was not in the heirs, they having conveyed by trust deed. Secs. 1762, 3, 4 and 5, and Secs. 2253, 2265-6 of Code examined, but the question as to power of heir to sell land descended so as to defeat the collection of ancestor's debt, not determined. *Id.*

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ADMINISTRATION.

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1. *Letters granted to public administrator within six months.* The provisions of the act authorizing the appointment of public administrators disclose a legislative intent that the parties interested in the estate of a decedent, should have six months within which to apply for administration in the usual way, and if letters have been granted to the public administrator, the probate court may, upon the application of the parties, within the six months, revoke the letters. *Varnell v. Loague*, 158.
2. *Attorney's fees.* An administrator, who incurs liability for attorneys fees beyond the assets of the estate in his hands, without consent or request of the heirs, cannot subject the real estate to sale for satisfaction of such liability. *Porterfield v. Taliaferro*, 242.
3. *Clerk's fees. Exemption.* The uncollected fees of a deceased clerk go to the administrator, to be by him administered, and not to his widow. *Stewart v. Taylor*, 352.
4. *Insolvent estate. Statute of limitation.* The suggestion of the insolvency of an estate does not change the period of limitation for suing on claims not due at the time of the qualification of the personal representative, but the claimant may, under the Code, Secs. 2330, 2377, be barred from becoming a party to an insolvent suit, or participating in the division of assets, unless he file his claim in said suit before an appropriation of the funds of the estate. *Hearn v. Roberts*, 365.
5. *Real estate. Alienation by heir.* The execution of a deed of trust, by an heir upon lands descended to him from his ancestor, to secure a pre-existing debt, is not such an alienation by the heir as can defeat the right of creditors to subject the real estate of the ancestor to the payment of his debts. The land, by statute, is assets for this purpose, and to allow the heir to appropriate it for his own debts, by deed of trust or mortgage, would defeat the law. *Camp v. Sherley*, 255.

ADMISSIONS.

See ESTOPPEL.

AFFIDAVIT.

See PLEADINGS AND PRACTICE; SUPREME COURT PRACTICE.

AGENCY.

1. *Good faith to principal.* An agent who agrees to take the money of his principal and loan it to good parties, must loan it in fact;

AGENT—*Continued.*

he cannot use the money himself, and pay the principal with the note of a third person based on a different consideration, without advising him of the facts. *Scott v. Turley*, 631.

2. *Repudiation by principal.* A principal, who receives from his agent the note of a third person under the belief that it belongs to him as his property, is not, upon a subsequent discovery of the facts and prompt repudiation, to be charged with the note because he did not sue upon it to the first terms of court held thereafter. *Id.*
3. *Same. Inconsistent conduct. Departure in pleading unnoticed.* Where the principal, after receiving from the agent the note of a third person under a mistake of fact, recovers judgment upon the note and then files a bill thereon to reach equitable assets, and afterwards, upon discovering the truth, files an amended and supplemental bill in that cause, bringing the agent before the court, repudiating his act, and seeking to hold him individually liable for the debt, while insisting at the same time upon the relief sought in the original bill, and the agent answers to the merits, without objecting to the form of suit or setting up the defense of ratification by reason of the course pursued, the principal will be entitled to relief under the bill repudiating the act of the agent. The amended and supplemental bill filed under such circumstances is, in substance, an original bill upon a different cause of action, and if the defendant, without objection, goes to trial on the merits, must be treated as such. *Id.*

AGENT.

See RAILROADS.

ALIENATION BY HEIRS.

See ADMINISTRATION.

AMENDED CERTIFICATE.

See MARRIED WOMEN.

AMENDMENT.

See PLEADINGS AND PRACTICE.

APPEAL.

See CHANCERY PLEADINGS AND PRACTICE; PLEADINGS AND PRACTICE.

1. *Interlocutory order.* After decree fixing the basis of account in an administration suit is submitted to and account taken thereon, an appeal does not lie from an interlocutory order recommitting the account, but only from a final decree. *Johnson's Estate*, 625.

ADMINISTRATION.

See CHANCERY PLEADINGS AND PRACTICE.

1. *Letters granted to public administrator within six months.* The provisions of the act authorizing the appointment of public administrators disclose a legislative intent that the parties interested in the estate of a decedent, should have six months within which to apply for administration in the usual way, and if letters have been granted to the public administrator, the probate court may, upon the application of the parties, within the six months, revoke the letters. *Varnell v. Loague*, 158.
2. *Attorney's fees.* An administrator, who incurs liability for attorneys fees beyond the assets of the estate in his hands, without consent or request of the heirs, cannot subject the real estate to sale for satisfaction of such liability. *Porterfield v. Tuliaferro*, 242.
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AGENT. .

See RAILROADS.

ALIENATION BY HEIRS.

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APPEAL.

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APPEAL--*Continued.*

2. *Judge, Special.* *Quere*, whether an appeal lies from the judgment of a special judge, selected by the parties merely because the regular judge was engaged in the dispatch of other business, where the record shows the fact, and that the bill of exceptions and judgment were signed by the special judge. *McCombs v. Guild, Church & Co.*, 81.

APPEAL, SPECIAL.

See SUPREME COURT PRACTICE.

ASSETS.

See BANK.

ASSIGNEE.

See CHANCERY PLEADINGS AND PRACTICE; PLEADINGS AND PRACTICE; LEASE.

ASSIGNMENT.

See WAREHOUSE RECEIPTS,

ATTACHMENT.

See PLEADINGS AND PRACTICE.

ATTORNEYS.

See PARTNERSHIP.

Powers of. Mrs. D sued D in replevin for sixty hogs. The suit was compromised. D was to have the hogs if he paid Mrs. D. fifty dollars November 1, 1878, otherwise the hogs were to belong to Mrs. D. Mr. G was the attorney of Mrs. D in the replevin suit. On November 1, D paid Greer fifty dollars. When Mrs. D some days after was informed of the payment, she denied his authority to receive the amount, and declined to take it when offered. *Held*, she could maintain an action of replevin for the hogs. Although Greer acted as her counsel in the case compromised, he had no right, without special authority, to accept the fifty dollars. *Dooley v. Dooley*, 306.

ATTORNEY'S FEES.

See CHANCERY COURT JURISDICTION; ADMINISTRATION; EXECUTOR.

BANK, INSOLVENT.

Conveyance by, void. Assets of an insolvent bank are trust-funds for the creditors, and a conveyance thereof is fraudulent and void. *Simpson v. Bank*, 713.

BANKS.

Directors. Directors who do not accept and fail to discharge the duties of the office not liable to creditors.. The owners of the charter and stock of a State bank, men of good character and having the confidence of the community, published in the newspapers of the city in which the bank was located, a business card of the bank, with their own names as officers, and with the name of one of themselves as a director, and the names of four other persons as directors, who were not stockholders, who had never been notified that they were elected directors, nor accepted the office, nor acted as such, and continued the publication for over four years with the knowledge of such persons, but without their active participation. *Held*, the bank having failed, that the creditors had no right of action, either through or independent of the corporation, against such persons for failing to discharge the duties of directors, it not appearing that they, or either of them, had done or said anything tending to lead any of the creditors to believe that they were directors. *Hume v. Bank*, 728.

BANKRUPT.

See PLEADINGS AND PRACTICE.

BIDDINGS.

See CHANCERY PLEADINGS AND PRACTICE; SALE OF LAND.

BILL OF EXCEPTIONS.

See SUPREME COURT PRACTICE.

BILLS AND NOTES.

See SUBROGATION.

Endorser. Agreement of maker to pay out of proceeds of a particular note. An agreement by the intestate in his lifetime with an accommodation endorser that he will, in consideration of the endorsement, pay the debt out of the proceeds of a particular note when collected, although in parol, and *a fortiori* if recognized by the intestate in writing, would be binding, and operate as an equitable appropriation of the specific fund, which would not be affected by the death of the intestate and the insolvency of his estate, the appropriation of the fund having been formally directed by the intestate in his lifetime. *McGuffey v. Johnson*, 555.

BOND.

See SUPREME COURT PRACTICE.

BOND, ADMINISTRATORS.

See SURETIES.

BOND, ATTACHMENT.

See PLEADINGS AND PRACTICE.

BOND, GUARDIAN.

See PLEADINGS AND PRACTICE.

BOND, REPLEVIN.

See CHANCERY PLEADINGS AND PRACTICE.

BOND, OFFICIAL.

Liability of surety. Secret conditions. Sureties on the official bonds of W. as clerk and master, after due notice moved to be discharged. W. procured P. to sign his name as a substitute surety, on the condition that others named would join. P. acknowledged the substitute bond before the chancellor, telling him at the time that others would sign, but not that his signature was void unless they did. The others did not sign; the bond was approved, the former sureties released, and W. remained in office. *Held*, that P. was liable as surety for all defalcations of W. after the date of his acknowledgment. *Bramley v. Wills*, 674.

BOOK OF ACCOUNT.

See WITNESSES.

BROKER, REAL ESTATE.

Commissions. If a broker is employed to sell property, and he first brings the property to the notice of the purchaser, and upon such notice the sale is effected by the owner, the broker is entitled to commissions. *Rogster, Waldron & Bacon v. Mayerney*, 148

CERTIFICATE AMENDED.

See MARRIED WOMEN.

CHANCERY COURT JURISDICTION.

1. *Damages for breach of warranty.* Chancery Court has jurisdiction of purely legal demands in attachment cases, and since the act of '77, of suits to recover damages for breach of warranty. *Williams v. Bury*, 455.
2. *Same. Measure of damages. Costs, but not attorney's fee.* Taxed costs in successful ejectment suit by adverse claimant, are recoverable by covenantor in suit against covenantor for breach of warranty. Counsel fees are not taxed costs, nor regulated as to amount by law in this State, and sums paid therefor by covenantor for defense in ejectment by adverse claimant, are not recoverable from covenantor. *Id.*

CHANCEY COURT JURISDICTION—*Continued.*

3. Chancery court has no jurisdiction to enforce the vendor's equitable lien, where the amount of the demand is less than \$50. *Malone v. Dean*, 336.
4. *Statute giving concurrent jurisdiction*. In all cases where the chancery court had original jurisdiction, a subsequent statute, without prohibitory or restrictive words giving a remedy by motion, confers concurrent, and not exclusive jurisdiction. *Bedwell v. Jones*, 168.

CHANCERY PLEADINGS AND PRACTICE.

See RAILROADS; AGENCY.

1. *Bill to have administrator appointed*. Under the provisions of the Code, sec. 2209, *et seq.*, a bill may be filed by the personal representative of one of the next of kin of a deceased person against another one of the next of kin having assets of the estate of the deceased in his hands, to have an administrator appointed, and for the collection of the fund. *Shoven v. McMackin*, 601.
2. *Administration. Granted upon presumption of death*. There being no statute in this State providing that after an absence of a given time without being heard from, administration may be granted of the estate of an absent person, the courts should be cautious in acting upon the presumption of death from lapse of time, and should, as a general rule, require diligent inquiry at the place where the party was last heard from. *Id.*
3. *Same. Same. Presumption as to time of death*. Where a person when last heard from expressed a possible intention of returning home in a reasonable time, and has not been heard from for over a quarter of a century, it may be presumed as a fact that he died at the end of seven years, and without issue, he having been unmarried when last heard from. *Id.*
4. *Answer as evidence*. If the facts stated in an answer in avoidance are a direct and proper reply to an express charge or interrogatory of the bill, the answer is evidence of these facts. *Id.*
5. *Insolvent estate. Filing claims*. It is not necessary that a creditor should make himself a party by petition, to an insolvent bill, if in the bill his claim is stated as a valid and subsisting claim against the estate. Filing his claim with the clerk within time will bar the statute of limitations. *Camp v. Sherley*, 255.
6. *Opening biddings. Notes date from sale*. Ordinarily, and in the absence of any controlling equity, upon the opening of the biddings of a judicial sale, the purchaser should be required to execute his notes for the purchase money as of the date of the public sale the biddings at

CHANCERY PLEADINGS AND PRACTICE—*Continued.*

which are opened, and upon the terms of the decree of sale. *Mabry v. Churchwell*, 488.

7. *Consolidated causes. Appeal.* An order of the chancellor, made upon the final hearing of independent causes, directing the causes to be consolidated and heard together, will leave each case to be tried upon its own pleadings, proceedings and proof, and an appeal by the complainants in one of the bills will only bring up their case, leaving the other causes in the court below, and the decree as to them in full force. *Oyburn v. Dunlap*, 162.
8. *Bill by sureties in replevin bond, after judgment.* A bill will not lie by the sureties in a replevy bond, after a judgment on the bond in the suit in which it was given, valid on its face, merely upon the ground that the interest of the principal in the goods replevied was that of a partner in a firm insolvent at the time of the attachment, the bill not being good as a bill of review, nor as an original bill to impeach the judgment for fraud. *Smyth v. Barbee*, 173.
9. *Collateral attack. Administrator. *Incompetency of judge who rendered the decree. Service of process.* Upon a bill filed by heirs to avoid a sale of ancestor's land under an administrator's bill to pay debts, it was held:
 1. Where the decree, under which the sale was made, recites that the personal estate had been exhausted, such finding is conclusive upon a collateral attack, and will not be reviewed upon bill filed to avoid the sale. *Posey v. Eaton*, 500.
 2. The fact that the administrator was improperly appointed, another administrator of the same estate having been appointed by another court of this State, will not be inquired into, when the appointment is valid upon its face, the administrative action of the county court is conclusive upon collateral attack. *Id.*
 3. That the judge, who, without objection, rendered the decree under which the sale was made, was of kin or counsel to parties, will not avoid the sale; his incompetency is waived, if unexcepted to at the time. *Id.*
 4. Where the original process has been lost or destroyed, and the decree and rule docket recite due service thereof upon the heirs, their uncorroborated denials of service, however positive, direct and confident, will not avoid the sale. *Id.*
10. *Evidence that deed was fraudulently signed.* Where, upon bill filed to foreclose a mortgage made by a husband and wife, the wife in her answer and cross-bill only avers generally that she was fraudulently induced to sign the deed, and did so under constraint and duress, without any statement of facts showing fraud, constraint or duress,

CHANCERY PLEADINGS AND PRACTICE—*Continued.*

the unsupported testimony of the husband and wife that she was induced to sign the deed by his threat to kill himself if she did not, would not be sufficient to vitiate the deed. *Grotenkemper v. Carver*, 280.

11. *Trust deed. Beneficiaries.* A beneficiary under a trust deed may attack a claim, secured therein, as fraudulent, and yet be allowed to claim under the trust. *Halliday Bros., v. Groom*, 349.
12. *Sales to enforce trusts. Advance bids.* Chancery, at the instance of a creditor and over the protest of the trustee, will sell land previously conveyed in trust to secure other creditors, and apply the surplus to the satisfaction of the claims of complainant creditors. Such sales will be opened upon advanced bids and possess all other incidents of chancery sales. It is proper, but not necessary, for the court to appoint the trustee as special commissioner to sell the land. *Shultz v. Blackford*, 431.
13. *Land sales. Taxes.* It is the duty of the court under the act of 1871, upon all lands sold under decree of the court, to have a reference to the clerk and master as to the amount of taxes due upon day of sale, and this before confirmation of sale, but if by inadvertence this is omitted, it may be done after confirmation at any time while the funds are under the control of the court. The amount of taxes is to be paid out of the purchase money. If the sale is confirmed and the amount of purchase money is paid, or the notes for the purchase money delivered to creditors or their solicitors without payment of taxes, the court may, at the same term of the court, order the funds to be refunded for payment of taxes. *Williams v. Whitmore*, 232.
14. *Attorney's lien. Chancery Pleadings and Practice.* Where a lien upon a fund in court is declared in favor of two firms of solicitors and the same is insufficient to pay both, the court will not permit one firm to appropriate the fund to their fee. If there is not a sufficient fund to pay both, the lien should be enforced *pro rata*, and if one firm of solicitors has drawn the fund, the court will order it paid into court to be divided *pro rata*. If one of the firm who drew the fund is insolvent, the court will compel the partner who is solvent to pay the sum, although the partnership may have been dissolved after the beginning of suit and before the decree, and the solvent partner had no knowledge of the transaction, and received no part of the money. *Id*
15. *Sale of land to pay decedent's debts. Jurisdictional facts.* In a decree for sale of land of decedent's to pay debts, the jurisdictional facts should appear, to-wit, the death of the party, appointment of administrator, the exhaustion of personalty and debts still unpaid. A failure to state whether the sale of a portion or all of the land was necessary to satisfy the debts, is a gross irregularity, for which a de-

CHANCERY PLEADINGS AND PRACTICE—*Continued.*

- creed might be reversed upon a direct proceeding, but will not invalidate the decree or render sale thereunder void. *Griffith v. Phillips*, 417.
16. *Same. Confirmation of sale and vestiture of title.* A confirmation of sale and a vestiture of title "upon payment of purchase money," is in legal effect a vestiture of title. *Id.*
17. *Appeal by one of several complainants.* An appeal by one of several creditors in a bill filed by them against an administrator, for a recovery of their several debts and an account of the personal assets of an estate, will not bring the case up as to another creditor whose claim has been allowed, so as to enable the appellees to call in question the validity of the judgment rendered in favor of the latter creditor. And, *quere*, whether the creditor who does not appeal can claim the benefit of a decree of this court, the effect of which would be to increase the assets liable to debts. *Cooper v. Lyons*, 596.
18. *Multifariousness.* A bill by a judgment-creditor of an insolvent bank, whose sole stockholder is personally liable for its debts, is not multifarious for seeking to obtain satisfaction by setting aside a fraudulent conveyance by the bank, recover judgment against the stockholder, and set aside fraudulent conveyances by him, and also remove a cloud cast on title by the fraudulent conveyances. *Sixpson v. Bank*, 713.
19. *Same. Creditor's bill.* An objection that a creditor of an insolvent corporation files his bill for his own use only, is obviated by the fact that the suit has been consolidated with another filed for all creditors. *Id.*
20. *Sale of land. Opening bidding.* Where land has been sold by the clerk and master under a decree of the chancery court, and before confirmation the bid is raised, it is in the discretion of the chancellor to open the biddings and let them remain open in the master's office, and receive such bids as may be offered, instead of again selling after giving public notice. The discretion must be exercised as in other cases of judicial discretion subject to correction in case of abuse or gross error. *Dupuy v. Gorman*, 144.
21. *Judgment.* A judgment or decree to be a bar as *res adjudicata* must be in the merits, but to this end it is not necessary that the litigation should be determined on the merits in the moral or abstract sense of these words; it is sufficient that the *status* of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases. *Parkes v. Clift*, 524.
22. *Demurrer.* A decree dismissing a bill upon demurrer, on the ground of lapse of time or laches, is on the merits, and a bar to another suit between the same parties or their privies, about the same subject-matter, and for the same purpose. *Id.*

CHANCERY PLEADINGS AND PRACTICE—*Continued.*

23. *Trusts. Local jurisdiction.* A chancery court in Tennessee has jurisdiction at the suit of a maker of a trust deed who resided in Virginia, where also the beneficiaries and trustee resided and the realty conveyed was situated, to administer and execute the trust, when a chose in action in Tennessee was embraced in the trust and it appears that it is the only part of the trust fund remaining undisposed of. *Wilenz v. Morrison*, 699.
24. *Notice. When presumed.* A judgment debtor, who becomes surety for the prosecution of a suit to enjoin the judgment against him, will be presumed to have notice of its assignment, when the fact of assignment is alleged in the injunction bill. *Id.*
25. *Collateral attack.* A decree between co-defendants in a chancery suit cannot be collaterally impeached by original bill because it was erroneous and reversible on appeal. *Id.*
26. *Foreign decrees.* The decrees of courts of a sister State touching the executing of such a trust *pro tanto*, will be respected and allowed to stand, unless it clearly appear that they are fraudulent. *Id.*
27. *Infant. Bona fide purchaser.* A decree of a court of chancery confirming a lease of an infant's realty is so far binding on the infant, that he cannot, by a bill of review, an original bill or other proceeding, impeach it to the prejudice of a *bona fide* purchaser for value, of the leasehold interest, before suit brought. *Anderson v. Annwonnott*, 1.
28. *Same. Equities. Prior and junior. Assignee.* The rule in this State, except when changed by statute, or in deference to statutory policy is, that a prior equity will prevail over a junior equity and the legal title with notice, or over the legal title of a volunteer with or without notice, and a purchaser in satisfaction of a pre-existing debt, and an assignee in trust to secure such a debt have always been treated, under the rule, as volunteers. *Id.*
29. *Lease. Assignment. Infant. Equities.* The equity, therefore, of an infant growing out of the fraud of the lessee in procuring a lease and a decree of court sanctioning the lease, is superior to the rights of a beneficiary under an assignment of the lease and leasehold interests to secure a pre-existing debt. *Id.*

CHARGE OF COURT.

See PLEADINGS AND PRACTICE; NEGLIGENCE; RAILROADS.

CHECK FOR BAGGAGE.

See COMMON CARRIER.

CIRCUIT COURT.

See HOMESTEAD.

CLERK'S FEES.

See ADMINISTRATION.

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COMMON CARRIER.

1. *Receipt. Evidence.* The receipt of goods by a common carrier directed to a place beyond the terminus of the carrier's line, without any limitation of responsibility, is *prima facie* evidence of an undertaking to carry the goods to the place to which they were directed, and renders the carrier liable for their carriage to that point. *Railroad v. Weaver*, 38.
2. *Baggage of passenger.* A carrier contracting, without limitation of responsibility, to carry the baggage of a passenger, and giving a check therefor to a given point beyond the terminus of the carrier's

COMMON CARRIER--*Continued.*

line, becomes liable for the carriage of such baggage in the same way, and to the same extent as the carrier of goods, although the passenger, whose baggage is thus checked, may purchase and travel upon a coupon ticket. *Id.*

3. *Same.* Where, therefore, the defendant, a common carrier, sold to the plaintiff tickets for herself and family for transportation by railroad from Memphis, Tenn., to San Francisco, California, each ticket having separate coupons for each carrier over whose road the route lay, and gave plaintiff a check for the carriage of her baggage to Omaha, and a loss of baggage occurred before reaching Omaha but after leaving defendant's own road, the defendant was held liable for the loss. *Id.*

4. *Same.* *Compensation therefor.* The plaintiff at San Francisco applied to the railroad companies whose roads lay beyond Omaha for compensation for the loss, and those companies, while denying all liability, made a deduction upon the plaintiff's return tickets over their roads, in consideration of her release of all claim against them for the alleged loss; it was held that neither the payment nor the release affected the liability of the defendant. *Id.*

CONSTITUTIONAL LAW.

Municipal corporations. The act of 1881, ch. 122, entitled "an act prescribing a mode by which municipal corporations may surrender or abolish their charters," is unconstitutional, because in violation of the Constitution, art. 2, sec. 17, it contains provisions for amending the charters of municipal corporations, in addition to those for abolishing the charters of such corporations. *Murphy v. State*, 373.

CONTRACT.

See TRUSTEE AND CESTUI QUE TRUST; PLEADINGS AND PRACTICE; WAREHOUSE RECEIPT; INFANT.

1. *Parol proof.* In a suit upon contract "to pay eight dollars per thousand for brick in the wall," proof of the usage or custom that the number of brick in the wall was to be ascertained by measurement and not by actual count, is incompetent. The terms of the contract are not ambiguous. The words and terms of the contract are not terms of art having any special signification or meaning different from their ordinary or popular meaning. The number of brick should be counted, but if not practical to ascertain the number by actual count, there can be no objection to adopting estimates based upon measurement, as the best means of approximating the number. *Sweeney v. Thomson*, 359.
2. *Sale of personal property.* *Possession passes to purchaser and title to remain in seller.* *Sub-vendee.* A contract for the sale of personal property, by

CONTRACT—Continued.

which the possession passes to the purchaser, but the title remains in the seller until the purchase money be paid, is valid, and the contract, although reduced to writing, need not be registered. As between the original vendor and a sub-vendee in such a case, it is a question of title, and neither the payment of the price, nor want of notice of the vendor's right will protect the sub-vendee from the claim of the owner. *McCombs v. Guild, Church & Co.*, 81.

3. *Same. Sub-vendee. Rights of where there is power to convey.* Exceptions to the rule in favor of the sub-vendee may exist: where the possession of the purchaser is coupled with the usual *indicia* of title and authority to convey; or with an apparent power to sell superinduced by the acts of the vendor; or, perhaps, where the conditional sale is made with knowledge to a regular dealer in the article. *Id.*
4. *Same. Same.* The case falls within the rule, and not the exception, when the plaintiffs, citizens of Boston, Massachusetts, sold a piano to a resident of Memphis, Tennessee, by contract in writing, stipulating for the payment of the price by instalments, that the chattel should remain the property of the plaintiffs until the price was paid, and that the vendors should have the right to take back the piano if the purchaser should fail to pay, or should sell, mortgage or convey the same in any manner without the written consent of the vendors, the proof merely showing that the purchaser brought the piano to Memphis, kept it for sale in a store where he had other pianos, and sold it, without the knowledge of the plaintiffs, to the defendant, who had no notice of the plaintiff's rights, for value. *Id.*

CONVEYANCES, UNREGISTERED.

See VENDOR AND VENDEE.

CORPORATION, DISSOLVED.

See RAILROAD.

CORPORATION, FOREIGN.

See RAILROAD.

CORPORATIONS, MUNICIPAL.

See CONSTITUTIONAL LAW.

Ordinances. Classifications of privileges. By the charter of the city of Memphis, the general council was authorized to establish and regulate market-houses and to license and regulate all mercantile houses and fresh meat stores. Under ordinances of the city, market-houses were established. Persons selling in market-house were only required to pay rent for stalls and not required to pay li-

CORPORATIONS, MUNICIPAL—*Continued.*

cense. By another ordinance it was required that all persons keeping "meat stores," for sale of fresh meat, not at market-houses, shall pay a license of one hundred dollars, and said persons so licensed shall not sell game, fish, vegetables and other articles of merchandise; no such store to be opened within one quarter of a mile of the market-houses. By another ordinance it was required that a license of fifty dollars be required by any keeper of a game or fish store. By another ordinance it is provided that any merchant regularly licensed shall be permitted to sell fresh meat from store in not less quantities than one quarter of any slaughtered animal, without other license. *Held*, that "meat stores" includes all sorts of meats, whether fish, flesh or fowl, and that the city council had no authority to make the selling of game and fish a separate privilege. The other ordinances were authorized. They are but a classification of the meat dealers with a license tax different in amount for one class than for the other, and properly graded by amount required to be sold. *Vosse v. City of Memphis*, 294.

COSTS.

See CHANCERY COURT JURISDICTION.

Justice of peace. Warrant. A warrant issued upon information and the person making oath informing the justice of the peace that he knew nothing of the facts himself, but had been told by a third party that the offense had been committed, is improvidently issued and without sufficient legal grounds, and the justice is not entitled to have cost taxed against county. *State v. Good*, 240.

COUNTY COMMISSIONERS.

County liable for work done. When. Under the provisions of the Revised Code, sec. 1273 a, b, c, which authorize the county court to appoint commissioners to contract for and have completed repairs of bridges, levees, etc., a person who performs work and furnishes material in such repair, with the knowledge and consent of the commissioners, and whose work is accepted and used by the county, may recover from the county what the work and material are reasonably worth, without an express contract by and with the commissioners. *Madison County v. Gibbs & Dean*, 383.

COUNTY LINE.

Establishment by commissioners. The correctness of the action of commissioners to "re-survey and establish the line between two counties," cannot be impeached in a private suit to which the counties are not parties. And, it seems, such action is conclusive upon the owners of wild land bounded upon such line. *Cross v. Sweeney*, 689.

COVENANTOR AND COVENANTEE.

See CHANCERY COURT JURISDICTION.

COVENANTS.

See VENDOR AND VENDEE.

1. *Judicial sales.* A covenant of warranty runs with the land and inures to the purchaser at a judicial sale. One who buys the land at a sale in a vendor's suit, to enforce his lien, may sue the vendor for a subsequent eviction, which constitutes a breach of vendor's warranty to his vendee. *Williams v. Burg*, 455.
2. *Warranty. Ejectment. Notice.* When covenantee gives covenantor notice of the institution of suit for eviction, the judgment therein is conclusive upon the covenantor. Thus, where covenantee in an ejectment suit by an adverse claimant, defines the extent of his boundaries and defends under covenantor's deed, and judgment is rendered adjudging that land so claimed by the covenantee is included in covenantor's deed and that the adverse title is superior, such judgment is conclusive upon the covenantor and prevents him from alleging, in a suit upon the covenant, that such land was not included in his deed. *Id.*
3. *Same. Form of notice.* No particular form of notice is necessary; if it explicitly and unequivocally notifies the covenantor of the institution of the suit and requests him to aid in making defense, it is sufficient. *Id.*

CRIMINAL LAW.

1. *Selling liquor without oath.* An oath "not to mix or adulterate with any poisonous substance whatever," is not a compliance with the statute requiring an oath "not to mix or adulterate with any substance whatever." *Hall v. State*, 574.
2. *Appeal. No, from order after conviction.* No appeal lies from an order of the trial court providing for the safe custody, within the jurisdiction of the court, of a prisoner, convicted of one offense, for trial of another offense of which he stands indicted in the same court. *Allen v. State*, 651.
3. *Sentence. Suspension of.* And, it seems, the court may suspend the execution of the judgment of conviction for this purpose. *Id.*
4. *Evidence. Dying declarations.* The State proved, without objection, that the deceased being in *extremis* and in apprehension of death, stated that the prisoner had mortally wounded her with an axe the defence afterwards introduced evidence tending to prove the insanity of the declarant; the trial judge charged the jury, that the sanity of the declarant was a question of fact for them to deter-

CRIMINAL LAW—*Continued.*

ine; it was insisted upon appeal that the judge should himself have determined the question of the sanity of the declarant. *Held*, that the defendant should have objected to the admission of the declaration, if he desired to raise the sanity of the declarant as a preliminary question; that the judge could not be put in error for admitting evidence, unobjected to at the time and competent in the shape presented, by other evidence subsequently introduced; and though it would have been his duty to withdraw the declarations from the jury if he had been convinced of the declarant's insanity, yet his action in not withdrawing the declarations implies that he thought the declarant sane, and, if erroneous, defendant could not complain, since the judge gave the jury the power to find this question, which he had thus impliedly determined against the prisoner, in the prisoner's favor. *Bolin v. State*, 516.

5. *Prisoner present at trial. When.* A prisoner in the dock in a position to see and hear all that is done, and has the opportunity to interpose objections, is in law present at the trial, and a new trial will not be granted because two jurors were accepted by his counsel while so confined in the dock. *Matthews v. State*, 128.
6. *Prisoner should not be manacled.* A prisoner should not be manacled or handcuffed during his trial, but if a juror is selected, by his counsel, upon the trial, when by inadvertence he is so handcuffed, it is not error for which a reversal will be had. *Id.*
7. *Confessions.* To say to the prisoner that "an honest confession is good for the soul," is not a promise of temporal benefit or discharge from punishment for the crime charged as will render a confession inadmissible. *Id.*
8. *Juror's challenge.* A person is incompetent to sit as a juror in a criminal case, and may be challenged for cause by the State, who has been tried and acquitted of a criminal charge at the term at which he is presented as a juror. *Murphy v. State*, 373.
9. *Same.* A juror, already selected and sworn in a criminal case, who announces that he had a suit in court, may be challenged by the State for cause and set aside by the court, although the clerk may, while the point is being brought by the court to the attention of counsel, proceed to swear the entire jury, all parties understanding the juror to mean that he had a suit pending at that term. *Id.*
10. *Proof of separate offenses.* *Attorney-General should elect.* Under a general presentment for selling an intoxicating beverage within four miles of an incorporated institution of learning, the State introduced three witnesses, each of whom proved a sale to him by the defendant about the same time of cider by the drink, to which was added, at the option of the purchaser, spirituous liquor. *Held*, the evidence of sep-

CRIMINAL LAW—*Continued.*

arate offenses was admissible to show the intent of the defendant, but that the attorney-general should have been required to elect on which offense he would try the defendant. *Id.*

11. *Small offense law.* If a defendant is brought before a justice upon a warrant for a felonious assault, the justice, if the defendant be not guilty of the felonious assault, may receive a plea of guilty of an assault and battery and fine the defendant under the small offense law. *Rose v. State*, 388.
12. *Misdemeanor. Punishment.* The act of 1870-71, making it a misdemeanor to enter upon the enclosed lands of another and to "willfully and wantonly destroy, carry away or injure the trees, shrubs, grain, grass, hay, fruit or vegetables there being," must be construed with sec. 4653 of the Code, and the punishment cannot be in excess of three months imprisonment. *Jordan v. State*, 404.
13. *Misconduct of jury. New trial.* A verdict will be set aside and a new trial awarded, where the officer in charge of a jury on a trial for murder, permits them to read a newspaper article about the trial of the case. *Carter v. State*, 440.

DAMAGES.

See CHANCERY COURT JURISDICTION.

On covenant of warranty. Vendee and remote vendor. A sold an undivided moiety of a lot to B, his co-tenant, for \$4500, making him a deed with covenant of general warranty; some years afterwards B sold to C the entire lot for \$3000, making a deed with like covenant; subsequently C was evicted by paramount title, which, being a trust assignment to secure a debt, did not require an account of *mesne* profits, and C sued A on his covenant of warranty. *Held*, that he could only recover one-half of the consideration paid by him to his immediate vendor, with interest from the date of eviction. *Mette v. Dow*, 93.

DAMAGES, MEASURE OF.

See PLEADINGS AND PRACTICE.

DAMAGES, VINDICTIVE.

See PLEADINGS AND PRACTICE.

DECREES, FOREIGN.

See CHANCERY PLEADINGS AND PRACTICE.

DEPOSITIONS.

See SUPREME COURT PRACTICE.

Exceptions. A deposition taken by a justice of the peace, and by him handed to the clerk of the court in which the suit is pending, is not subject to exception because he did not envelope and seal it and endorse upon the seal his name and the style of the cause. *Hutson v. Hutson*, 354.

DIRECTORS OF BANK.

See BANK.

DOWER.

See SALE OF LAND.

EJECTMENT.

See SUPREME COURT PRACTICE; COVENANT; HOMESTEAD.

1. *Limitation. Adverse possession. Pleadings and practice.* To counter-vail superior paper title, the adverse possession must have been actual by fences, enclosures or buildings, where the land is capable of such possession, and where it is not, such fact must be averred in pleading. Such acts as cutting timber, grazing cattle, erecting hog-pens, are illusory and insufficient. *Hicks v. Fredericks*, 491.
2. *Evidence.* The declarations of one in possession of land as to his holding, where no tenancy of any kind is shown except the declarations sought to be proved, are incompetent as evidence. *Stranahan's Heirs v. Terry*, 560.
3. *Eviction. Warranty.* In ejectment, although the covenant of warranty is not broken without eviction by paramount title, yet eviction by judgment by law is not necessary, the warrantee may voluntarily yield possession to him who had a better title and claim for a breach of the covenant. But in such case the party does so at his peril, and in a suit against the warrantor the burden of proof is upon plaintiff to show the paramount title. A judgment against him of paramount title would be conclusive on the warrantor. *Callis v. Cogbill*, 137.

ELECTION.

See SALE OF LAND.

1. *Sheriff. Contest. Fees.* W was inducted into office of sheriff. C contested his right to the office. The contest was decided in favor of C. W had collected a part of his uncollected fees, to the clerks of the several courts for indebtedness. Upon bill filed by C, held, that the

ELECTION—*Continued.*

fees in specie belonged to C, and as to the fees earned by W and not reduced to possession, C was entitled to recover against the assignees. *Currey v. Wright*, 247.

2. *Contest. Face of returns.* An action which undertakes to go behind the certificate of the returning officer of an election by the people, is a contest of the election within the meaning of our statutes, and, in the case of the office of sheriff, must be commenced and tried under the Code, sec. 889, and not under the Code, sec. 3409, *et seq.* *Anderson v. Gossett*, 644.

EMPLOYEE.

See NEGLIGENCE.

ENDORSERS.

See SUBROGATION.

EQUITIES PRIOR AND JUNIOR.

See CHANCERY PLEADINGS AND PRACTICE.

ESTOPPEL.

See WAREHOUSE RECEIPT; ADMINISTRATOR.

1. *Former suit.* An adjudication, in a bill filed by an administrator to subject realty descended, that the personalty had been exhausted, is not an estoppel upon the heirs from contesting that question in a subsequent suit by a creditor for the same purpose, and showing a *devastavit*. *Charles v. Spears*, 725.
2. *Judgment.* The estoppel of a judgment or decree extends to all matters material to the decision of the cause which the parties, exercising reasonable diligence, might have brought forward at the time. *Purkes v. Clift*, 524.
3. *Equitable. Recitals in deed. Insufficient description.* The recital of a deed excepting out of the conveyance lands embraced therein must, to work an estoppel, be as definite and descriptive as are required by law in a deed of conveyance, either by their presence in the deed relied on as an estoppel, or by a reference to another in which they are sufficiently set out. *McDonald v. Lusk*, 654.
4. *Party to suit.* Where, under bill filed by trustees of a corporation against its stockholders, one of the stockholders obtains a suspension of the decree, gives a deposition and receives various notices of taking accounts, depositions, etc., he is estopped, in a collateral suit to allege or prove he was not served with process. *Watterson and Riley v. Lyons*, 566.

ESTOPPEL—*Continued.*

5. *Admissions.* An admission made in an answer is a solemn admission *in judicio*, and estops the party to deny the admissions afterwards in another suit. *Id.*

ESTRAY.

See PLEADINGS AND PRACTICE.

EVIDENCE.

See PLEADINGS AND PRACTICE; MARRIED WOMEN; COMMON CARRIER; WITNESSES; SALE OF LAND; WAREHOUSE RECEIPT; BILLS AND NOTES; EJECTMENT; CHANCERY PLEADINGS AND PRACTICE; CONTRACT.

Expert testimony. Insurance. Upon the question as to whether it was a material change of risk for insured property to become vacant during the existence of the policy, the testimony of experts, as a matter of opinion, is inadmissible. If the fact, that vacancy increases the danger of loss by fire, the reason is susceptible of proof by introduction of facts that make it so. *Kirby v. Insurance Co.*, 142.

EXECUTION.

See SALE OF LAND; TRUSTS.

1. *Levy. Writ of error and supersedeas. Garnishment.* A levy upon personal property will be discharged by writ of error and supersedeas; so, also, a levy by garnishment. *Rocco v. Parczyk*, 328.
2. *Teste.* The relation of the lien of an execution to its teste is a pure fiction of law, and ought not to be indulged further than the courts are bound to go by the well-settled law. The case of *Berry v. Clements*, 9 Hum., approved. *Id.*

EXECUTOR.

Attorney's fee if will is not established. If a person named as executor in a will offers it for probate and it is sustained in the county court, but upon appeal to the circuit court it is not established, he will be allowed reasonable attorney's fee out of the estate, if the proceedings were in good faith and upon reasonable grounds. *Bowden v. Higgs*, 343.

EXEMPTION.

See PARTNERSHIP; ADMINISTRATOR.

EXPRESS COMPANY.

Railroads. Privilege tax. A railroad company which organizes an express company and carries on a regular express business as a part of the business of the railroad company, under the management and control of its officers, and by its own agents, is subject to pay a privilege tax imposed by statute upon express companies. *Railroad v. State*, 218.

FACTOR.

See RENT.

FALSE IMPRISONMENT.

See PLEADINGS AND PRACTICE.

FEES.

See ELECTION.

FRAUDULENT CONVEYANCE.

See TRUST ASSIGNMENT; BANK.

Deed in trust. A conveyance in trust of all the debtor's property (realty) to secure a debt of only one-third its value, with two-and-a-half years to run before maturity, is fraudulent in law, though the creditor have no purpose except to secure his debt. *Hartman v. Allen*, 657.

GARNISHMENT.

See PLEADINGS AND PRACTICE; EXECUTOR.

GUARDIAN.

See RENTS.

HEIRS.

See ADMINISTRATOR.

HOMESTEAD.

See MARRIED WOMEN.

1. *Abandonment.* Previous to the act of 1879, the homestead right may be lost by the abandonment of the occupancy by the head of the family. *Henry v. Wilson*, 176.
2. *Circuit Court. Ejectment.* The circuit court may assign homestead in an action of ejectment, and though it is more regular to

HOMESTEAD—Continued.

lay off homestead before giving plaintiff final judgment for the residue, the court will not reverse because the circuit judge gave plaintiff judgment for the land excepting homestead, which was subsequently assigned. *Arnold v. Jones*, 545.

3. *Life-estate. Valuation.* Homestead is in all cases a tract of land in which the fee, and not the estate owned by the defendant, is worth a thousand dollars. *Id.*
4. *Mode of conveyance.* Previous to the constitution of 1870, the husband could convey valid title to the homestead without the concurrence of the wife, even where he declared his intention to claim the homestead, in the manner then provided by law, unless the homestead had been actually laid off. *Kincard v. Buren*, 553.
5. *Abandonment.* Removal from homestead, by one appointed to the office of jailor during the will and pleasure of the sheriff, to the jail, and occupation of it for a residence for a year, is not an abandonment of homestead. *McInturf v. Woodruff & Co.*, 671.

HUSBAND AND WIFE.

See CHANCERY PLEADINGS AND PRACTICE; MARRIED WOMEN.

INFANT.

See CHANCERY PLEADINGS AND PRACTICE.

Contract conveying him land is not void but voidable. Ratification. A contract in writing, executed by an infant, which conveys to him land in fee, and recites a money consideration secured by the notes of the infant, is not void but voidable only, and unless disaffirmed within a reasonable time after he comes of age, will be binding on the infant, although the notes given for the purchase money may be void because negotiable; and a delay of four years is unreasonable, during the first two of which years the infant paid three of the instalments of the purchase money, and during the last two the land depreciated in value.

INNOCENT PURCHASER.

See MARRIED WOMEN.

INSOLVENT ESTATE.

See CHANCERY PLEADINGS AND PRACTICE; PLEADINGS AND PRACTICE; ADMINISTRATION.

INSURANCE.

See EVIDENCE.

Forfeiture. Vacancy. The insured cannot recover upon a policy of in-

INSURANCE—*Continued.*

urance which provides that should the premises become vacant, the policy should be forfeited, where the loss occurred while the premises were temporarily vacant. *Ridge v. Insurance Co.*, 507.

INTERLOCUTORY ORDER.

See APPEAL.

JUDGE, SPECIAL.

See APPEAL.

JUDGE, INCOMPETENCY.

See CHANCERY PLEADINGS AND PRACTICE.

JUDGMENT.

See PLEADINGS AND PRACTICE; ESTOPPEL; ADMINISTRATOR.

Satisfaction of. Bid on land. A judgment satisfied by the sale and purchase of land under it cannot be used in advancing the bid upon an execution sale of other land of the judgment debtor upon a mere averment that no title was acquired under the first sale, there being no averment or proof that the satisfaction of the judgment had ever been set aside and the judgment revived. *Gentry v. Wagner*, 682.

JUDICIAL SALES.

See COVENANTS.

JURISDICTION.

See CHANCERY PLEADINGS AND PRACTICE; SUPREME COURT.

JUSTICES OF THE PEACE.

See COSTS.

1. *Offenses committed in their presence. Commitment to prison.* The magistrate may order the arrest of any one for a public offense committed in his presence, but he has no power, without an examination or hearing, to commit him to prison. If there be good cause for postponing the hearing, the offender may give bail in a bailable case. If he fail or refuse to give bail, then he may be committed to prison *Touhey v. King*, 422.
2. *Authorizing constable to sign warrant.* A justice of the peace cannot authorize a constable to fill up a warrant and sign his name in his absence. The signing of the warrant is an official act which cannot be done by power of attorney. *Kirkwood v. Smith*, 228.

JUSTICES' JUDGMENT.

See PLEADINGS AND PRACTICE.

JUSTICES OF COUNTY COURT.

See PLEADINGS AND PRACTICE.

LANDLORD AND TENANT.

See RENT.

LEASE.

See CHANCERY PLEADINGS AND PRACTICE.

1. *Lien for improvements passes to assignee.* A stipulation in a lease for the valuation, at the end of the term, of any improvements made by the lessee, and for a lien on the improvements for the amount of the valuation, if not paid by the lessor, shall pass to an assignee of the lease. *Anderson v. Ammonett*, 1.
2. *Lessor and Lessee. Quantum Meruit.* Where the lessor, under a lease of land for three years, in consideration of the lessee's clearing it, refuses to perform his contract, the lessee may sue for labor done and recover a sum expressed by the enhancement of the value of the land, less reasonable rent. *Duncan v. Blake*, 534.
2. *Same. Custom.* A farmer's custom that lessee, in consideration of clearing land, shall have the right to sell the cut timber, is good, and when clearly established, prevails where contract is silent. *Id.*

LEVY.

See EXECUTION.

LIEN, ATTORNEY'S.

CHANCERY PLEADINGS AND PRACTICE; LEASE; RENT; PARTNERSHIP.

LIMITATION.

See PLEADINGS AND PRACTICE; ADMINISTRATION; EJECTMENT.

1. *Statute of.* In a suit by heirs to recover lands descended from an ancestor, and for this purpose to set aside a judgment against the ancestor, as void for want of notice or fraud, and a sale of the lands made under the judgment during the life of the ancestor, the time of limitations or laches would begin to run against the ancestor. *Parkes v. Clift*, 524.
2. *Same. Administrator. Request for delay.* A sufficient request for delay by an administrator will not prevent the running of the limitation of seven years (Code, 2786), in favor of the estates of decedents. That

LIMITATION—*Continued.*

statute not only bars the remedy, but extinguishes the right, and need not be pleaded. *Cooper v. Lyons*, 596.

3. *Same. Administrator. Distributee.* The share of a distributee in either personal or real estate cannot be appropriated by the administrator to a debt claimed to be due from the distributee to the intestate, shown to be barred by the statute of limitation, when the defense is pleaded and relied upon. *Richardson v. Keel*, 74.

LIMITATION OF ACTIONS.

- Code 2755 construed. The Code, sec. 2755, which authorizes a plaintiff to commence a new action within one year after the rendition, in a suit commenced by him within the time limited by the statute of limitations, of a judgment or decree against him "upon any ground not concluding his right of action," does not apply when the judgment or decree is on the merits. *Parkes v. Clift*, 524.

MARRIED WOMEN.

1. *Conditional sale.* A married woman contracted with a dealer for the purchase of a piano, and signed an instrument of writing, by which she acknowledged receipt of the piano, at a certain valuation, with right of use, and agreed to purchase it by monthly instalments of a given sum, or more if convenient, a deduction of ten per cent. to be made in the price if paid in twelve months, the title being retained by the dealer until the payments were made in full and at the time agreed, with the right on his part to resume possession in default of payments as stipulated, and in certain other contingencies, the payments, in that event, to be in full for the use of the piano at the rate of the monthly instalments of purchase money. *Held*, that the stipulation to pay rent must be treated as conditional upon the purchaser's election to abandon the purchase, and would not otherwise be binding on her. *Meagher v. Hollenberg* 392.
2. *Same.* The married woman made payments, but not in accordance with the terms of the contract, and the vendor brought an action of replevin for the piano. *Held*, that the married woman might, by bill in equity, enjoin the action, and have the transaction declared a sale at the price, and upon the terms of payment agreed on, with the legal title retained by the vendor as security for the purchase money, and a decree adjusting rights accordingly. *Id.*
3. *Mortgage. Husband agent of creditor. When.* Where the husband procures his wife's conveyance to homestead, or to her lands, to secure a pre-existing debt of his, he will be regarded as the agent of the creditor, who will be bound by the husband's actions. *Edwards v. Boyd*, 204.

MARRIED WOMEN—Continued.

4. *Privy examination. Amended certificate.* An amended certificate of probate of the privy examination of a married woman, when properly made under the statute, will have all the force of an original probate, and as between the parties, and volunteers under them, will relate back to the date of the privy examination. *Grotenkemper v Carver*, 280.
5. *Same.* Such a certificate is not successfully impeached by the testimony of the husband and wife, that the husband remained, in the clerk's office while the privy examination was taken, the husband stating that he does not remember whether he was out of hearing or not, and the wife being silent on this point, and saying that she signed the deed and acknowledged it. *Id.*
6. *Separate estate. Power to mortgage.* A married woman, to whom land has been conveyed "to her sole separate use, and to be held by her free from the debts, liabilities and contracts of her present husband, or any future husband she may have," may mortgage such land for the security of her husband's debts. *Id.*
7. *Same. Amended certificate of probate. Relates to date of deed.* A person who takes a conveyance from a husband and wife of part of the wife's separate estate, in payment of a pre-existing debt, and with notice of a previous conveyance by them of the same property in mortgage by a deed, the certificate of privy examination of which is defective but is afterwards amended under the statute, is a volunteer, and cannot resist the claim of the mortgagee. *Id.*
8. *Mortgage. Husband and wife. Husband not agent of. Mortgagee-When.* The payment of a substantial consideration at the time a mortgage by husband and wife is made, will constitute the mortgagee a purchaser for value, although a part of the consideration be a pre-existing debt, and, nothing else appearing, the husband cannot be held to be the agent of the mortgagee in procuring the wife to join in the deed. *Id.*

MORTGAGE.

See MARRIED WOMEN; ADMINISTRATION; ADMINISTRATOR.

NEGLECT.

See PLEADINGS AND PRACTICE; RAILROADS.

Employee. Charge of court. In action by employee against railroad company for personal injury resulting from negligence in equipment of a hand-car, wherein contributory negligence was a defense, the following charge on that subject was held not positive error: "If the handle of the lever was defective, and such defect was known to the plaintiff, and he accepted, or continued in its service, using the

NEGLIGENCE—Continued.

same with full knowledge of the defects, he could not recover;²³ and "if the plaintiff might, by the exercise of ordinary care, have escaped the injury, he cannot recover." *Railroad v. Smith*, 685.

NOTICE.

See CHANCERY PLEADINGS AND PRACTICE; COVENANTS.

OFFICER'S RETURN.

See PLEADINGS AND PRACTICE.

PARTNERSHIP.

1. *Division of property among partners. Exemption.* Partnership property cannot be divided between partners and then claimed under the exemption laws so as to defeat the partnership creditor. *Gill v. Latimore*, 381.
2. *Attorneys, partnership.* Upon a dissolution of a law firm, in the absence of an agreement to the contrary, either member may give his attention to and, in the absence of the other, control any unfinished cases in which the firm may have been employed. As to such unfinished business they are still partners. *Williams v. Whitmore*, 262.
3. *Same. Liabilities of partners.* If a partner receive more than he is entitled to within the scope of his partnership, the firm must refund the excess. *Id.*
4. *Prior equity of partner. Dissolved firm.* A partner in a dissolved firm has a lien on partnership realty for the amount due him on general settlement of the partnership account, superior to the execution lien of post-dissolution creditors of another member of the firm, though it had been dissolved for five years, and the title stood in the name of the individual members of the firm. *Lane v. Jones*, 627.
5. *Failure of Settlement* And this lien will prevail when there was a parol agreement of partial settlement, by which the other members were to convey the realty to the creditor member of the firm, but failed to complete the conveyance. *Id.*
6. *Extent of partnership account.* This lien extends not only to indebtedness arising from inequality of capital contributed, but also of personal account with the firm. *Id.*

PLEADINGS AND PRACTICE.

See SALE OF LAND; ADMINISTRATOR; DEPOSITIONS; EJECTMENT.

1. *Insolvent estate. Appeal from clerk to circuit court. Trial in circuit court.* An account was filed with the clerk against an insolvent estate. Clerk disallowed the account, and an appeal was taken to the

PLEADINGS AND PRACTICE—Continued.

circuit court. No issue was there made up. *Held*, that the issue to be tried was the right to recover on the account filed. *Peacock v. Wilson*, 318.

2. *Parties. Assignee.* A subscription was authorized to Mt. Carmel Church, to be paid when the building committee required the money. The subscription was assigned to contractors and suit brought before a justice of the peace in the name of Mt. Carmel Church for the use of the assignees, and judgment for plaintiffs. *Held*, that the subscription was a promise to pay the building committee, and suit should have been brought in the name of the building committee, to use of assignees, but under sec. 4124 of the Code, the judgment being for the benefit of the assignees, who have the beneficial interest and are the real parties. *Mt. Carmel Church v. Journey*, 215.
3. *Administrator. Suit in forma pauperis.* An administrator who is sole beneficiary in a recovery of a suit which he might maintain in his own name, cannot maintain such action as an administrator in *forma pauperis*. *Barbee v. Frazier*, 348.
4. *Liability of justices of county court. Negligence. Loss.* To sustain an action against justices of the county court for accepting a guardian's bond with only one surety instead of requiring two or more sureties as prescribed by statute, there must be proof of actual loss by reason of the act or omission, otherwise the recovery would only be for nominal damages. *Spears v. Smith*, 483.
5. *Suit on attachment bond. Bankrupt. Assignee.* The bankrupt's right of action for wrongful suing out of an attachment, passes to the assignee in bankruptcy in so far as the action seeks compensation for injuring, detaining or converting the property attached, but it remains with the bankrupt in so far as the action seeks to recover compensation for injury to the bankrupt's business, reputation and credit, and vindictive damages for malicious suing out or abusive use of the attachment; but, though the bankrupt and assignee may maintain separate actions and recover, the assignee for the injury to the property, and the bankrupt for the personal tort, yet the aggregate recoveries cannot exceed the amount of the penalty where the action is on the attachment bond. *Doll v. Cooper*, 574.
6. *Same. Measure of damages.* The measure of damages for wrongful suing out of an attachment is, (1) loss by injuring, detaining or converting the property attached; (2) loss by injury to plaintiff's business, reputation and credit, as where plaintiff is thrown into bankruptcy by the attachment; (3) vindictive damages based on the falsity or *mala fides* of the claim, wanton abuse of process or express malice in suing out, levying or continuing the attachment; and these three elements of damage constitute the recovery in an action on the attachment bond as well as in the action at common law. *Id.*

PLEADINGS AND PRACTICE—*Continued.*

7. *Vindictive damages.* Vindictive damages cannot be recovered in an action for wrongful suing out of an attachment, where the declaration does not aver malice. *Id.*
8. *Condemnation of land Revivor.* A *venditioni exponas* may issue on a judgment condemning land tested at a subsequent term, without revival of the order. The testimony of the judgment debtor alone will not be sufficient to impeach the return of an officer on an execution that he had given notice of a sale thereunder, as required by law. *Henry v. Wilson*, 176.
9. *Res adjudicata. Judgment.* It was agreed that the judgment of the Supreme Court in a certain case should determine the other cases pending in the court below. Judgment was entered in the Supreme Court, and it is held, that upon trial of cases below, upon proper issue, by answer or plea, the invalidity of the judgment of the Supreme Court might be shown as that the parties were dead at the time of rendition of judgment. *Nolan v. Cameron*, 234.
10. *Counterpart writ. Justice's judgment.* Suit was brought before a justice against partners in a county where only one of them resided. A writ was issued to another county, where the other two partners lived, against them only, not showing that the resident had been sued. Judgment was taken against all these partners, and bill filed by two non-residents to enjoin it, because it was void. Held, that the writ was in substance a counterpart writ, though informal, and that the judgment was valid against all the partners. *White & Depue v. Lea*, 449.
11. *Attachment. Affidavit. Amendment. Plea in abatement.* An affidavit for attachment before a justice of the peace not subscribed, though certified by the justice before whom made as sworn to and subscribed before him, does not render the attachment void. The defect may be cured by amendment. An appearance and plea to the merits is a waiver of the defect in the indictment. *Agricultural Association v. Madison*, 407.
12. *Same.* If the defendant appears and pleads to the merits before the justice of the peace, it is too late to file a plea in abatement in the circuit court to which an appeal has been taken. *Id.*
13. *Suit prematurely brought.* Upon contract for sale of goods to be paid for in thirty days, if the vendee abandons the possession of the goods and vendor re-possesses them, he cannot sue for the purchase money before the expiration of the time of payment. He can only recover upon the contract, and suit to enforce collection before the money was due by the contract, cannot be maintained. *Brady v. Isler*, 356.
14. *Replevin. Estray.* An action of replevin cannot be maintained for an estray where the plaintiff has not taken the steps required

PLEADINGS AND PRACTICE—*Continued.*

by the statute to have the animal appraised and advertised. *Duncan v. Starr*, 238.

15. It is not error for the court to refuse to grant a jury to try a cause where the jury has not been demanded in the pleadings, upon an affidavit that two dockets are not kept and the act had not heretofore been enforced. If a jury is not demanded in the pleadings it shall be conclusively held to be an agreement to try without a jury, and the failure of the clerk to keep two dockets is no part of the agreement and can not impair the operation of the statute. *Travis v. Railroad*, 231.
16. *New trial. Misconduct of jury.* Upon a motion for a new trial based upon affidavit because of the misconduct of a juror, it is the duty of the court, to examine in open court, the jurors as to such misconduct. *Whitmore v. Ball*, 35.
17. *Appeal. Garnishment.* An appeal, from a justice's judgment on garnishment, by the original debtor, does not bring up the case as to the garnishee, and he cannot amend his answer in the circuit court; the judgment of the justice is conclusive as to him. *Bryant v. Bigelow & Hill*, 135.
18. *Declaration. False imprisonment.* It is a good defense to a declaration for false imprisonment, to show that the arrest was under lawful and valid process, issued by a competent tribunal, having jurisdiction. Under a declaration for false imprisonment plaintiff cannot recover upon proof showing a case of malicious prosecution. *Herzog v. Graham*, 152.
19. *Contract. Charge of court.* If the plaintiff and defendant both testify there was a contract for services, but differ as to amount, it is not error for the court to charge the jury that "if the jury should find there was no contract, they would allow the plaintiff what his services were really worth." The jury might find that there was no contract, the minds of the parties not agreeing to the same stipulations. *Rocco v. Parczyk*, 328.
20. *Contract. Wages. Evidence.* It is not error, in a suit for wages per contract, to show in support of plaintiff's understanding of the contract that when he went to work for the defendant, that he was receiving from another person, whom he voluntarily left, a much larger sum than the amount defendant insisted he was to receive. *Id.*
21. *Evidence. Contradiction of witnesses as to irrelevant matter.* While great latitude is allowed in cross-examination, yet the answer of a witness cannot be contradicted as to a matter entirely irrelevant to the case. *Id.*

PLEADINGS AND PRACTICE—*Continued.*

22. *Tort may be waived and suit be for value. Limitation.* The owner of personal property may waive the tort in its conversion, and sue in contract for its value, in which case the limitation of the action will be that for causes of action in contract, although the title to the property may, before suit, have become vested in the wrong-doer by lapse of time. *McCombs v. Guild, Church & Co.*, 81.

PLEDGEE OR ASSIGNEE.

Collateral Security. His rights and powers. A pledgee or assignee of collateral security, with authority to settle with the parties liable on such securities, may, in good faith, compound the debt, and will only be liable for the actual amount due to the assignor from such parties; and, although ordinarily a change of security would not be allowable which was not plainly advantageous, yet the assignee, who has an interest in the fund, and acts in good faith under the advice of counsel, would not be liable under the circumstances except for an abuse of trust. *Randolph v. Merchants Bank*, 63.

POSSESSION, ADVERSE.

See EJECTMENT.

PRESUMPTION OF DEATH.

See CHANCERY PLEADINGS AND PRACTICE.

PRINCIPAL AND AGENT.

AGENT. Agent not responsible for damages. When. One who acts without compensation as a friend or agent for another abroad, and as such friend or agent contracts in the name of his principal for work to be done for the principal, is not responsible in damages for accidents that may result from the manner of doing the work, or a failure to exercise extraordinary care in its execution, the undertakers being men of ordinary care and skill, and so known to the agent. *Jodunson v. Memphis*, 125.

PRIVILEGES.

See CORPORATIONS, MUNICIPAL.

PRIVILEGE TAX.

See EXPRESS COMPANY.

RAILROADS.

See EXPRESS COMPANY.

1. *Passenger. Conductor.* A traveler on a railroad train, traveling on a commutation coupon ticket, which provides that

RAILROADS—*Continued.*

the coupons shall be void if detached by any other person than the conductor, and that the ticket shall be shown to the conductor each trip, who shall detach the coupons for the number of miles to be traveled, technically violates the contract by detaching the coupons himself. If, while detaching the coupons, his attention be called by the conductor to the fact that it is his duty to detach them, the passenger should at once desist, and hand the ticket and coupons to the conductor, in which event it would be the duty of the latter, if he saw the coupons detached or could readily ascertain by inspection that they had been detached from the ticket, to accept them. But the conductor would not be bound to receive the detached coupons without seeing the ticket. *Railroad Co. v. Harris*, 180.

2. *Same. Same.* If such a passenger refuse to deliver his ticket to the conductor on demand, and insist upon making payment of his fare with coupons which he has himself detached, it would be a violation of the contract by him, for which he may be put off the train, with such force as may be necessary, in case he refuse to go voluntarily; and he cannot, while being lawfully ejected, regain the right of passage by a tender of his fare in a rude, boisterous or insulting manner. *Id.*
3. *Same. Same.* The weight of authority is that a passenger, who has first violated the contract of passage by a failure to pay his fare at the proper time upon demand, cannot, by tendering the fare when he is being put off, or upon a re-entry after ejection, acquire a right of passage, but the strict rule ought, perhaps, to be confined to willful violations of contract. *Id.*
4. *Statutory regulations.* The statute requires, when obstructions appear upon the road, that the *alarm* whistle should be sounded, but does not specify the number or character of whistles, and the question is reserved whether if an engineer sounded for brakes, that would be a compliance with the statute. *Dinwiddie v. Railroad*, 309.
5. *Same.* The statute does not specify the number of brakemen there shall be upon the train. This is a regulation left to the railroad company, which must be reasonable and in conformity with general usage and the course of business of railroads. To require one brakeman to each car is unreasonable. *Id.*
6. *Effect of sale of, to enforce State's lien.* The effect of the sale of a delinquent railroad at the suit of the State to enforce its statutory lien, was to transfer the title of the road and its appurtenances and corporate franchises to the purchaser, and, unless the company was the purchaser, to dissolve the corporation. *Railroad Co. v. Kyle*, 691.
7. *Corporation, Dissolved. Suit by.* A suit in the name of a corporation thus dissolved, brought more than five years after dissolution,

RAILROADS—*Continued.*

cannot be maintained unless it appear that, under Code, sec. 1496, the chancellor has granted further time for closing the business of the dissolved corporation. *Id.*

8. *Personal injuries causing death. Contributory negligence. Damages. Charge of court.* In an action against a railroad company for personal injuries causing death, upon declaration containing two counts, one for failure to observe statutory precautions, and the other for common law negligence, the proof showed that plaintiff's intestate was standing upon a platform about thirty-eight inches high and about two feet from the track at a station which was not a regular stopping point; when the train was about one hundred yards distant, she got down from the platform and began to walk upon the ends of the cross-ties, between the platform and the rails; being warned by a bystander of her danger, she said, "I think I can make it," but turned and beckoned to her child not to follow her; she was caught by the train before reaching the end of the platform and killed. The engineer testified he did not see her.

1. The circuit judge, at the request of plaintiff's counsel, charged "If plaintiff's intestate got herself without negligence into a position of danger, she is not to be held responsible for contributory negligence for an honest though erroneous exercise of judgment in getting out." *Held*, this was misleading and erroneous; if the appearances were such as to put a reasonable person in apprehension of danger, and she disregarded them and her death resulted in consequence, this was such contributory negligence as bars a recovery at common law, and mitigates damages under a count for failure to observe statutory precautions.

2. Defendant's counsel asked the court to charge, "It is the duty of an intelligent being to exercise reasonable precaution to avoid danger, and this precaution must be exercised in proportion to the danger and the knowledge of the danger." To which the court replied: "That applies to the common law count, but not to the count for statutory negligence." *Held*, this was error; the instruction requested applies to both counts, the difference being that deceased's violation of this rule would bar the remedy at common law and mitigated the damages under the statute.

3. The court instructed the jury that they might consider as an element of damage, the loss by deceased's children of the society and protection of their mother. *Held*, this was error; this is an action under Code, sec. 2291, and in such case plaintiff can recover only such damage as deceased could claim had she lived. *Railroad Co. v. Smith*, 470.

9. *Speed of trains.* It was error to charge that if the train was running at such a speed that it could not be stopped within the distance the head-light would discover objects upon the said road, the

RAILROADS—Continued.

jury might find the company guilty of recklessness, notwithstanding all the prescribed precautions were observed. There is no law prescribing the rate of speed at which trains should run. The question of recklessness or excessive speed is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by aid of the head-light. *Railroad Co. v. Milam*, 223.

10. *Foreign corporation. Suit against agent.* The C. & A R. R. Co. having no office nor any part of its line in this State, employed B as its agent in this State to induce travelers to take such routes as connected with their line. B had no authority to sell tickets for his principal, and his business, which consisted principally in securing emigrants as patrons for his company, required that he should travel from place to place, see passengers, aid them in purchasing tickets, and checking baggage on connecting lines, and correspond with persons likely to travel over his principal's line. His presence was frequently required at C., in this State, that place being a railroad centre of lines connecting with his principal's, but he had no office or place of business there. W. sued the Company for breach of a contract made with B, serving process on B, whose want of authority to receive the service of process was raised by plea in abatement. *Held* that the service was invalid and the plea good. *Rebroid Co. v. Walker*, 475.
11. *Franchises may be assigned. When.* The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights, and may be assigned; but the franchise to form or be a corporation and act in a corporate capacity is legislative, and not the subject of sale or transfer except by some positive provision of statute law pointing out the mode of transfer. *Bagan & Buffet v. Aiken*, 609.
12. *Chancery pleadings and practice.* The bill alleged that a particular railroad, with all its property, effects and franchises, was sold under the proceeding by the State against delinquent railroads, and subsequently re-sold by the purchaser to an individual named, and by him to the defendant, who had continued to operate the road under the charter of the original corporation, and had charged and received from the complainants excessive freight. *Held*, upon demurrer, that the defendant was not the corporation, and that the bill was properly filed against him as an individual. *Id.*
13. *Rate for transportation.* By statute the railroad companies of this State are given the exclusive privilege to carry freight and passengers over their respective roads, "provided that the charge for transportation or conveyance shall not exceed 35 cents per 100 pounds on heavy articles, and 10 cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger."

RAILROADS — *Continued.*

Held, that the intention of the Legislature was to confer upon each company the right to charge, as a common carrier, for freight and passengers carried over its road, or any part of it; that the intent was not to proportion the charges by any unit of distance, but to fix a maximum beyond which the company could not go, and to leave the tariff of charges, within that limit, to the company, subject to the rule of the common law that the charges should be reasonable, and to the regulating power of the courts and the Legislature. *Id.*

14. *Common carrier. Rates of freight.* A common carrier is bound to carry at equal rates for all customers in like condition, but may discriminate in rates of freight between customers not in like condition, if the discrimination be fair and reasonable, and not inconsistent with the public interest. *Id.*

15. *Same. May discriminate in rates of freight. When.* A common carrier may discriminate in favor of persons living at a distance from the end of the route, where the object is to secure freight which would otherwise reach its destination by a different route, and other customers not in like condition will have no right of action because of the discrimination, if the charges made against them are reasonable. *Id.*

RATES OF FREIGHT.

See RAILROADS.

RATIFICATION.

See INFANT.

REDEIPT.

See COMMON CARRIER.

RESCISSION.

See SALE OF LAND.

REDEMPTION.

See SALE OF LAND.

REGISTRATION.

In what book? A trust-deed conveying realty is notice to the world, when properly acknowledged and noted for registration, though it be registered in the chattel-mortgage book. *Svepson v. Bank*, 713.

RENTS.

1. *Charges. Wills.* Where the testator directs that a child should receive a provision from the rents of a tract of land, thereby making the support of the child a charge upon the land, rents accruing subsequent to the child's death are liable for debts contracted previously by her guardian for her support. *Long v. Read*, 538.
2. *Lien. Factor.* A factor who sells cotton for a tenant and appropriates the proceeds to a debt due him, by consent or direction of the tenant, and with knowledge that his debtor is a tenant, is not liable to the landlord who has a lien for rent upon the cotton. The factor is not a purchaser, but a seller, and is not liable to the landlord under the statute, as a purchaser. The fact that the tenant paid him the proceeds, does not make him a purchaser of the crop as required by the statute to make him liable. *Armstrong v. Walker*, 156.

RENUNCIATION.

See TRUST ASSIGNMENT.

REPUDIATION.

See AGENCY.

RES ADJUDICATA.

See CHANCERY PLEADINGS AND PRACTICE; PLEADINGS AND PRACTICE.

REVENUE.

See SUMMARY PROCEEDINGS.

SALE, CONDITIONAL.

See MARRIED WOMEN.

SALES, JUDICIAL.

See CHANCERY PLEADINGS AND PRACTICE; ADMINISTRATORS; PLEADINGS AND PRACTICE.

SALE OF LAND.

1. *Under execution.* If a sheriff, under an execution, sells land and it is bid in by a purchaser who fails to pay the money, and he again sells at a less sum to another purchaser, the first purchaser cannot be held liable by the judgment creditor for the difference in the first and last bid. *Harvey & Keith v. Adams*, 289.
2. *Rescission. Redemption. Dower.* C executed a deed of trust to secure F first, and then B. C died, and then trust was foreclosed. F purchased the land for his debt. B redeemed and sold his

SALE OF LAND—*Continued.*

interest to the widow of C, and this bill is filed by her, asking to set aside sale upon the ground that she was mistaken as to her right of dower. *Held*, that after ten years' acquiescence in the purchase, a mistake cannot be made the basis of a rescission. There must be made out a clear case of fraud or misplaced confidence. B having conveyed only his interest in the land, the widow is entitled and will be allowed dower. *Hudson v. Conway*, 410.

3. *In gross or per acre. Parol evidence. Pleadings and practice.* Where it is uncertain from the face of the deed or bond, whether the sale was in gross or per acre, parol evidence is admissible to show the intention of the parties; and where it appears from the face of the deed or bond that the sale was in gross, it may be shown to have been a sale per acre, upon allegation and proof that the deed or bond was so drawn through fraud or mistake. *Deakins v. Alley*, 494.

4. *Parol. Election by purchaser.* A tract of land having been sold, under an administrator's bill, to pay debts subject to redemption, one of the heirs, for himself and as agent of the other heirs, made a parol sale of a part of the land to a third person for more than the amount bid at the judicial sale, and the purchaser paid the bidder his debt, and took an assignment of his interest for the benefit of the heirs, and was put in possession of the land by the heirs under the parol contract, but afterwards, and after the time of redemption had expired, set up title to the whole tract under the assignment. *Held*, upon bill filed by the heirs, that the parol sale was void at the election of the purchaser, but that the heirs were entitled to recover possession of the land and to have an account as upon rescission, or as between mortgagors and mortgagees, unless the purchaser, under the offer of the bill, elected to take the land upon the terms of the parol contract, in which event the decree would be for the specific enforcement of the contract. *Hays v. Worsham*, 591.

SALE OF LAND TO ENFORCE TRUST.

See CHANCERY PLEADINGS AND PRACTICE.

SALE OF PERSONAL PROPERTY.

See CONTRACT.

Stoppage in transitu. Rights of seller and attaching creditors. Goods which have been sold but have not gone into the possession of the buyer who is insolvent, may be reclaimed by the seller for his own indemnity, and this right of reclamation he may exercise notwithstanding the goods may have been seized by execution or attachment by creditors of the buyer. *Mississippi Mills v. Bank*, 314.

SCHOOL FUND.

County trustee may sue for. The county trustee may maintain a bill in chancery against the sureties of a defaulting former trustee, for an account of monies collected for the use of common schools. *Bedwell v. Jones*, 168.

SEPARATE ESTATE.

See MARRIED WOMEN.

SHERIFF.

See ELECTION.

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STATUTES CONSTRUED.

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STATUTE OF FRAUDS.

Parol promise to pay debt of another. A written promise to “arrange the debt,” contained in a letter by a third party to a creditor who had recovered judgment, on which said third party was asking delay, is a valid promise to pay such debt, and will warrant judgment against him on delay granted. *Abel & Hodges v. Wilder*, 453.

STOPPAGE IN TRANSITU.

See SALE OF PERSONAL PROPERTY.

SUBROGATION.

Endorsers. T and G were first and second endorsers for W. Judgment was recovered against G. T furnished G \$7,000, to aid in paying the judgment. G paid the balance. Prior to the judgment the debtor by deed of trust conveyed property to G to secure him as said endorser and to secure other indebtedness to G. Held, that T was not entitled to share in proceeds of trust property until the indebtedness of W to G had been satisfied in full. The doctrine of subrogation in favor of creditor or co-security does not apply. The first endorser was liable for full amount of the judgment, and was not entitled upon the sum he had paid to share *pro rata* in the trust property with G, but only entitled to whatever sum might remain after payment in full of the indebtedness of W to G. *Wallace v. Greenlaw*, 145.

SUMMARY PROCEEDINGS.

Motion by trustee against officer for revenue. A clerk in the office of the trustee, upon a settlement with an officer for unpaid taxes, makes a mistake, giving a receipt for a larger sum than he had really collected, but for the sum the officer really owed, and upon balancing his cash account afterwards, he discovered the mistake and makes good the sum to the trustee out of his own funds. *Held*, the trustee cannot maintain a motion under the act of 1875 against the officer for such unpaid revenue. The amount due from the officer is due the clerk and not to the trustee. *McGowan v. Tally*, 302.

SUPREME COURT PRACTICE.

See **WILLS**.

1. *Depositions. Bill of exceptions.* Depositions taken before a clerk on a reference by the judge of a law court in a lawsuit before him, and made the basis of the clerk's report, are not part of the record of the suit, unless made so by bill of exceptions. *Nesf & Whigham v. Gas Co.*, 467.
2. *Reversal on Facts.* The Supreme Court will not disturb a verdict, "though the jury might well have found the weight of proof to be the other way." *Railroad v. Smith*, 685.
3. *A cause will not be remanded. When.* A cause will not be remanded for the purpose of bringing new parties before the court after a protracted litigation, unless the applicant's right to relief be clear. *Randolph v. Merchants Bank*, 63.
4. *Can only adjudicate upon matters raised by the pleadings.* The courts can only adjudicate such matters as are properly brought before them by the parties in the mode prescribed by law and the practice of the court; they cannot notice matter, however clearly proved, of which there is no allegation or issue in the pleadings; and the Supreme Court has no more power than the lower courts to pronounce a decree upon matter outside of the record. *Randolph & Jenks v. Merchant. Bank*, 63.
5. *Special appeals.* It is error to grant a special appeal from a part of a decree declaring the rights of the parties and directing an account, and this court will either dismiss such an appeal or review the decree as upon a broad appeal, correcting errors in appellant's favor as well as against him. *Williams v. Burg*, 455.
6. *Ejectment. Judgment on bond.* Upon affirmance of a judgment for plaintiff in an ejectment suit where defendant has given bond pending appeal as required by act of 1879, this court will order a writ of possession and give judgment for rents, and remanding cause for proof and enquiry as to amount of rents and damages. *Arnold v. Jones*, 545.

SUPREME COURT PRACTICE—*Continued.*

7. *Decree. Parties not of record.* Persons not parties to a suit at the rendition of a decree in this court, cannot be heard to make a motion to annul a part of that decree. *Pettit v. Cooper*, 21.
8. *Jurisdiction. Decree void. When.* The jurisdiction of the court, so far as it is appellate, is confined to the subject-matter of the record and the parties before the court, and any action of the court, although entered in the form of a decree, which goes outside of the record, or undertakes to bind parties not before it, would be *coram non judio*, and void. *Id.*
6. *Decree and written opinion.* A motion to annul a part of a decree as inadvertently entered, cannot be entertained, where the written opinion of the court expressly directs that the part of the decree objected to should be embodied therein. *Id.*
10. *Power to reverse, alter or explain a decree.* The Supreme Court cannot adjudge rights acquired under one of its decrees, nor reverse, alter or explain a decree, entered in conformity with its opinion, upon motion. *Id.*
11. *Bill of exceptions.* An affidavit that there was not kept by the clerk jury and non-jury docket cannot be looked to. It should appear from the statement of the presiding judge as a part of the bill of exceptions. *Dinwiddle v. Railroad Co.*, 309.

SURETIES.

See PLEADINGS AND PRACTICE.

Administrator's bond. Testator directed, among other things, that his executors take an inventory of his mercantile establishment, and open a new firm for the benefit of his children, and run the same until youngest child is of age. If the house fails to show a dividend, then the executors might suspend until they shall think it to the interest of the minors to renew said business. They proceeded to administer the estate and opened the new business house, which afterwards contracted debts to insolvency. Suits were brought for debts of the business house against executors and the sureties upon their bond. *Held*, sureties were not liable. They were only liable for matters of administration covered by the bond of the executors as such, and not liable for failure of executors to discharge the trusts imposed by the will. *Carter Bros. v. Young & Co.*, 210.

TAXES.

See CHANCERY PLEADINGS AND PRACTICE.

TRANSFER TO FEDERAL COURT.

Amount involved. Two non resident defendants, whose several claims,

TRANSFER TO FEDERAL COURT.

each less than \$500, are enjoined in the same suit, cannot, by assignment of one to the other pending the suit, unite them in one, and thus obtain the right to a transfer of the cause to the Federal Court on the ground that the amount involved between complainant and one of them is over \$500. *Lane v. Jones*, 627.

TRUST ASSIGNMENT.

See CHANCERY PLEADINGS AND PRACTICE; REGISTRATION.

1. *Renunciation.* An attachment suit was compromised by the son and heir of the original defendant, conveying the attached land in trust to secure the debt, and the attachment was dismissed; the creditor discovering that the father subsequent to the attachment had, by voluntary deed, conveyed the land attached to the son for life, with remainder in fee to the son's children, filed a bill for a rescission, expressly renouncing the security of the trust assignment and praying for the restoration of his attachment lien; the rescission was denied and the bill dismissed; the creditor subsequently bought the land at the trustee's sale, and brought ejectment against the son *Held*, the bid for rescission was only a conditional renunciation of the security of the trust assignment, depending upon the restoration of the attachment lien. *Arnold v. Jones*, 545.
2. *Fraudulent conveyance. Fraud in law.* A trust-deed is not fraudulent on its face because no time is specified for the sale of the property conveyed; and the trustee, a young man without property, and excused from bond, is authorized to rent until sale; and allowed to sell on credit in his discretion; and to compromise or arbitrate any matter of litigation; and do all other proper and necessary acts as fully as could the grantor; and the amount of the preferred debts is not specified. *Simpson v. Bank*, 713.

TRUST AND TRUSTEE.

See SUMMARY PROCEEDINGS.

1. *Interest which they take.* The doctrine in this State is, that trustees take that quantity of interest which the purposes of the trust requires. *Henderson v. Hill*, 25.
2. *Limitation of trust estate in fee.* An express limitation of the trust estate in fee, created by deed in land, will not be cut down to a less estate where the fee is required for the purposes of the trust, nor, it seems, in any case, unless the limitation be restrained by the terms of the deed to so much of the trust as relates to the equitable estate under a fee. *Id.*
3. *Special or active trust.* A trust in fee in land, created to protect the estate for a prescribed period, and to preserve contingent remain-

TRUST AND TRUSTEE—*Continued.*

ders, is a special or active trust which is not executed in the beneficiaries either under the statute of uses, or the law as settled in this State. *Id.*

4. *Trust. Legal and equitable estates. Execution operates. When.* An execution only operates upon an estate in which the legal title is coupled with the beneficial interest, or in which the legal and equitable interests are merged by law in the same person, or so combine in him that he has a right to call for an immediate conveyance of the legal estate; but there can be no merger nor right to call for the legal estate, where the legal and equitable estates are not commensurate, or where their union would be contrary to the intent of the grantor. *Id.*

5. *Same. Execution will not operate. When.* An execution, therefore, will not operate on land conveyed in fee by deed to a mother in trust for her own use during life or widowhood, and, upon her death or marriage, to be conveyed by the trustee to such of her three daughters named as may then be living, and the children of such of them as may be dead, or, if the daughters be all dead, to their descendants *per stripes*, and, if no living descendants, to the grantors, the ultimate contingent remainder being conveyed by the grantor to the mother. *Id.*

TRUSTEE, COUNTY.

See SCHOOL FUND.

TRUSTEE AND CESTUI QUE TRUST.

Trust property. A conveyed a tract of land to L by deed, acknowledged and registered, no lien retained. A by contract was to receive an annuity from L, and at his death to be paid a sum of money, which was to be a prior lien upon all his property. This contract was unregistered. L under a contract put P, his agent, in possession of the land. L left the country and P filed a bill against him as a non-resident for account, and the land was sold. S became the purchaser, and afterwards conveyed to P, who all the time was in possession. L died abroad, and his heirs commenced suit against P for the land, which was compromised by giving the heirs a part of the land. A files bill to enforce her contract. *Held*, she was entitled to have the land sold to pay her the amount due, both the land held by P and by the heirs. The agent could not, without notice, change the character of his possession so as to make it adverse. The heirs take the real estate subject to all burdens imposed upon the property. *DeArusment v. DeLagerty*, 188.

VENDOR AND VENDEE.

See MARRIED WOMEN; DAMAGES.

1. *Unregistered deed. Creditors of vendor. Liability of vendee.* The vendor of land assigned the purchase notes to a third party in consideration of a pre-existing debt. The vendee paid a part of the purchase money note to assignee and promised to pay balance. The vendee failed to register his deed which had been probated, and creditors of the vendor levied executions upon the land after the assignment of the notes. The vendor became insolvent after the assignment of the notes. Vendee filed bill to be relieved of payment of the notes, because the land had been appropriated to debts of the vendor, and assignee filed cross-bill to enforce vendor's lien. *Held*, assignee had no lien after levy of executions upon the land, and that the vendee would not be relieved from payment of the notes, because there were no *existing* equities at time of assignment, and the vendee's negligence in failing to have his deed registered barred the assertion of right to be relieved. *Taylor v. Deakins*, 520.
2. *Same. Covenants.* In the absence of fraud, accident or mistake, the vendee must rely solely upon his covenants from the vendor for relief; thus, the vendee of a purchaser at a sheriff's sale, which is void on account of tracts not contiguous being sold as one body of land, whose deed contains no other covenant than special warranty, has no remedy as against his vendor. *Prigmore v. Shelton*, 563.

VENDOR'S LIEN.

See CHANCERY JURISDICTION.

WAREHOUSE RECEIPTS.

1. *Assignment. Estoppel.* Warehouse receipts are considered representatives of property, and an assignment of the receipt is equivalent to a delivery of the property, and the warehouse-man is estopped, as against the assignee, to deny that he had the articles mentioned in the receipt. *Stewart, Gwynne & Co., v. Ins. Co.*, 104.
2. *Contracts. Evidence.* These receipts are generally contracts, and cannot, like ordinary receipts, be varied, explained or contradicted by parol proof. *Id*

WARRANTY.

See DAMAGES.

WARRANTOR AND WARRANTEE.

See EJECTMENT.

WILLS.

See EXECUTOR; RENTS.

1. *Probate in solemn form.* A devisee, a stranger in blood to the testator, has a right to have the will probated in solemn form upon petition to the county court. *Roberts v. McMillan*, 571.
2. *Construction. Power.* After providing for the payment of debts, etc., testator directs that his widow "shall control my real and personal property to the best advantage to raise and educate our children and to use what may be necessary for that purpose;" also, "that my children shall be made equal in the division of my estate, real and personal;" also, "that my children should all receive about the same in the way of education, and as they arrive at age that they be assisted out of my estate what she may think necessary, but not go beyond what would be their part," with special authority to the widow to convey certain tracts of land: *Held*, 1. That the title to lands did not pass to all the children, as tenants in common by inheritance, but passed to them by devise; and 2. The widow, as executrix, had power to convey the entire estate in any tract, under the restrictions imposed in the will. *Maloney v. Hawkins*, 663.
3. *Contested will. Reversal on facts.* The will of a sane old man, made seven years before his death, whereby the estate is given to his widow for life, should not be disturbed merely on the ground that her will was stronger than his, and that in other trivial matters she had occasionally controlled his actions; and the Supreme Court will reverse the judgment of an inferior court, setting aside a will, based on a verdict found only on such slight circumstances. *Simerly v. Hurley*, 711.

WITNESS.

1. *Administrators, Transaction with or statement of deceased.* The statute which forbids either party, in an action by or against a personal representative, to testify against the other as to any transaction with, or statement by the deceased, cannot be extended by the courts to cases not within its terms, upon the ground that they fall with in the evil which was intended to be guarded against. *Rielly v. English*, 16.
2. *Same. Same.* Where, therefore, in an action of replevin, the defendant claimed title as the administrator of a deceased intestate, the vendor of the plaintiff is a competent witness to prove the agreement between him and the deceased in relation to the chattel, although the title of the deceased was also claimed to be derived by purchase from the witness. *Id.*

WITNESS—*Continued.*

3. *Same. Same. Book of accounts.* In such an action, the book of accounts of the deceased, purporting to contain an account in his hand-writing, with the witness, is not admissible as evidence on behalf of the defendant to prove the state of accounts between deceased and the witness, with a view to establish the title of the deceased to chattel sued for. *Id.*

WRIT, COUNTERPART.

See PLEADINGS AND PRACTICE.

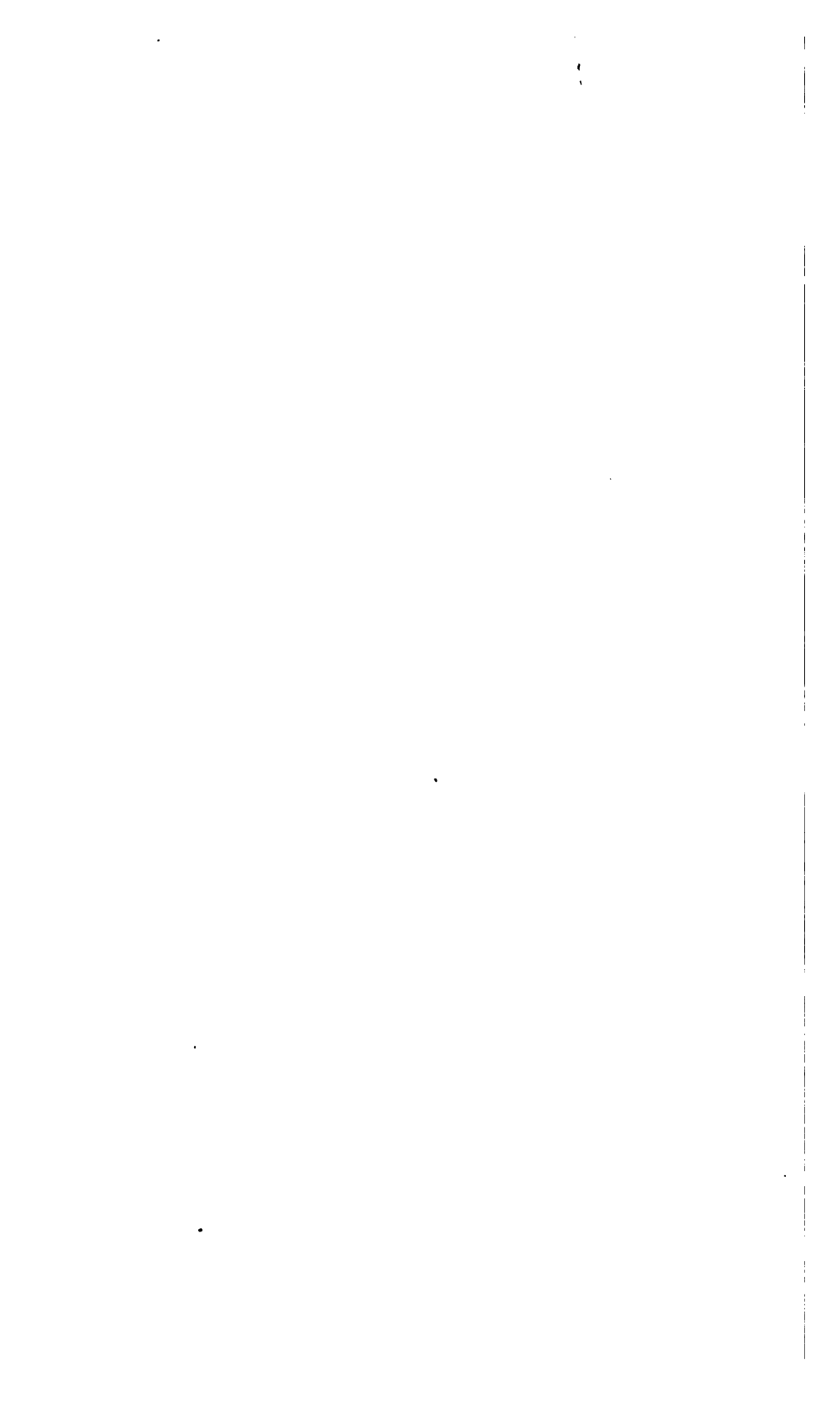
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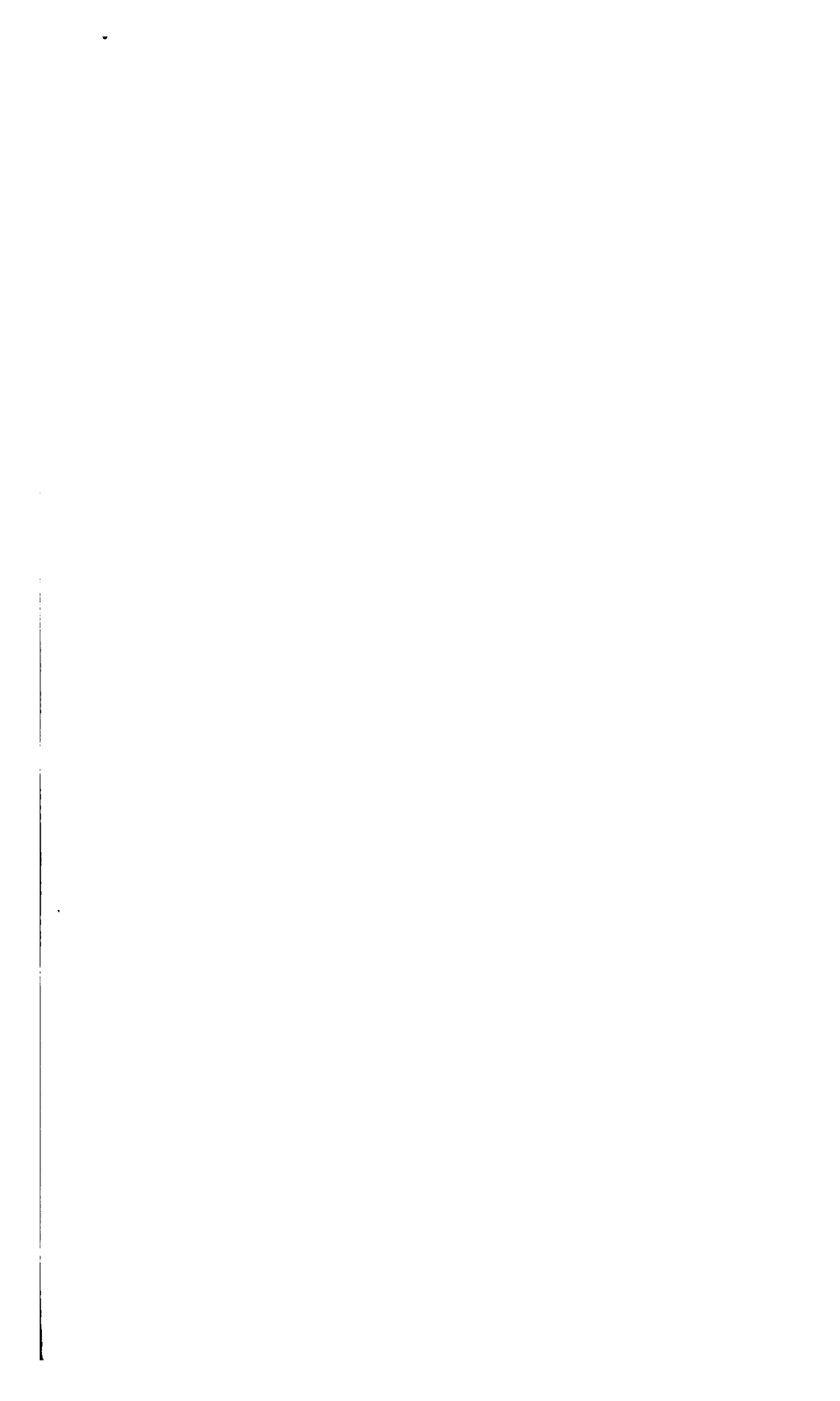
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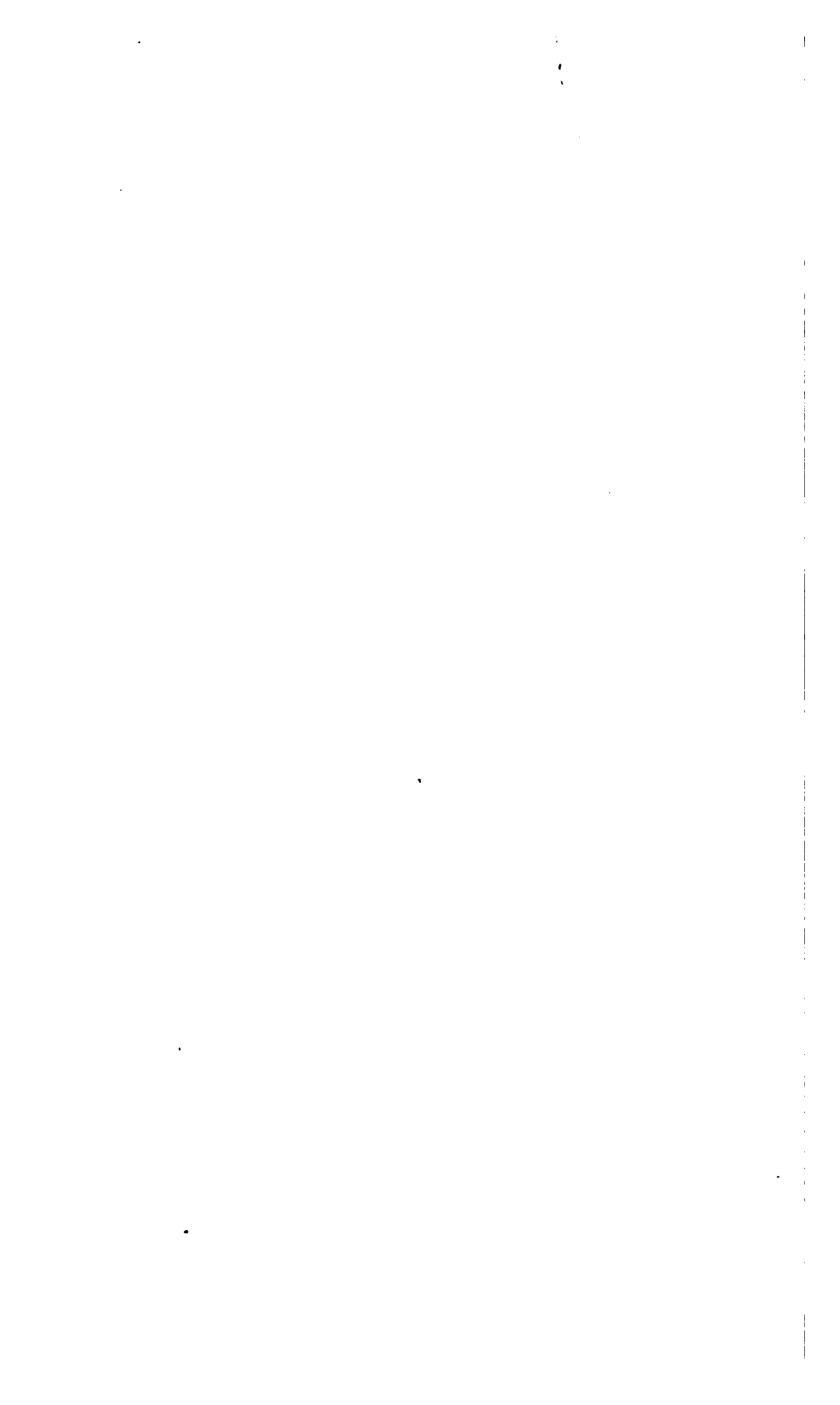


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